Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02–287 OF 1994

LAMIN PCA, CHONG SIEW FAI CJ (SABAH & SARAWAK) AND MOHAMED DZAIDDIN FCJ

24 OCTOBER 1998

Contract *— Breach — Fundamental breach — Appellant applied for bridging loan and end-finance — Approved by respondent — No end-finance available to appellant — Whether this constituted fundamental breach that went to root of contract — Whether obligation on respondent to provide end-finance*

Contract *— Construction of terms of contract — Loan — Bridging loan and end-finance approved by respondent — No end-finance made available to appellant — Whether approval subject to any condition precedent or syndication of end-finance*

Contract *— Misrepresentation — Negligent misrepresentation — Representations by respondent's manager to appellant — Reliance on representations — Whether representations gave impression of certainty of end-finance — Whether manager was negligent in making statements — Whether representations amounted to collateral warranties*

Evidence *— Parol evidence rule — Pre-contract promise — Certainty of end-finance not in letter of approval — Additional evidence on collateral warranties — Nature of written agreement — Whether additional evidence on collateral warranties fall within s 92(b) of Evidence Act 1950 and admissible*

Civil Procedure *— Res judicata — Cause of action estoppel — Negligent misrepresentation and breach of collateral warranty — Respondent argued both causes of action already litigated — Burden on respondent to establish that both causes of action adjudicated upon — Whether respondent established this — Whether res judicata applied*

Contract *— Agency — Principal and agent — Second appellant negotiated as agent for first appellant throughout — Within knowledge of first respondent — Breach of collateral warranty — Whether second appellant could sue on breach — Whether there was privity of interest between both appellants*

The first appellant ('Kluang Wood') was a licensed housing developer and the registered proprietor of a piece of land in Johor ('the land'). The second appellant ('Chew') was a director of the first appellant. Chew was introduced to one WP Pang ('Pang') who was the southern regional manager of the first respondent ('Hong Leong'). In early 1983, the appellants negotiated with Hong Leong for banking facilities to enable them to develop the land into a housing estate. A formal application was made, seeking RM4.5m as a bridging loan and RM21m as end-finance. According to Chew, during the negotiation between him and Pang, Pang agreed that Hong Leong would furnish Kluang Wood with a bridging loan and a syndicated end-finance. Pang had represented to him in the course of their

negotiation that for a finance company of Hong Leong's repute, the amounts of the end-finance and the bridging loan would not be a problem. On 26 October 1983, the first respondent approved the application vide a letter of approval. By that letter, Hong Leong had expressly or impliedly represented to Kluang Wood that a bridging loan of RM3.5m and an end-finance facility of RM26m had been approved, with Hong Leong's share of the end-finance being RM5m. Kluang Wood pleaded that Hong Leong had further represented that the initial drawdown of the said end-finance facility would be in the first quarter of 1984. As security for the bridging loan, Kluang Wood created a charge over the land in Hong Leong's favour, and Chew and the other directors executed a letter of guarantee. In January 1984, Hong Leong prepared a placement memorandum for syndication of the end-finance of RM26m.

However, no end-finance at all, including Hong Leong's RM5m, was made available to Kluang Wood though the bridging loan of RM3.5m had been fully utilized by Kluang Wood. Hong Leong then took out a writ against the guarantors including Chew for recovery of the bridging loan ('the Johor Bahru suit'). A final judgment under O 14 of the Rules of the High Court 1980 was obtained against Chew and other guarantors. Hong Leong was also granted an order for sale of the land, which was later sold to the second respondent, a wholly owned subsidiary of Hong Leong. On this, the appellants alleged that Hong Leong had acted in bad faith and/or fraudulently in the exercise of its power of sale in that it had at all times formed the intention to purchase the land by itself or through the agency of another. However, the part of the appeal was abandoned by the appellants.

The appellants claimed that Hong Leong's failure to provide the end-finance of RM26m as represented in its letter of 26 October 1983 caused the failure of the project and also disabled Kluang Wood from servicing the interest on the bridging loan. They further alleged that Hong Leong was negligent and acted in breach of its duty when it represented to Kluang Wood that the end-finance of RM26m would be made available to house buyers and that the first drawdown would be in the first quarter of 1984. They also pleaded that the representations of Hong Leong constituted a collateral warranty and in breach of the said warranty, Hong Leong had caused them loss and damage. The respondents argued that they owed no duty of care to the appellants on the alleged representation. They contended that the appellants were estopped from litigating the principal cause of action in the suit on the ground of res judicata, as the issues raised by the appellants have already been litigated by Hong Leong in the Johor Bahru suit.

The trial judge had found that Hong Leong had represented to Kluang Wood that availability of the end-finance was certain, that the first drawdown thereof would be in the first quarter of 1984, and that

Pang had been negligent in making the representations. Pang's oral representations were held to constitute a collateral warranty which was breached when no part of the end-finance came from Hong Leong. The trial judge also held that Hong Leong's plea of res judicata succeeded in that the claims of Kluang Wood and Chew in this action on negligent misrepresentations and alternatively for breach of collateral warranty could not be litigated upon because there was privity of interest between Kluang Wood and Chew in the Johor Bahru suit, Chew being a director and agent of Kluang Wood. The trial judge dismissed the appellants' action, against which the appellants appealed. Hong Leong cross-appealed against the trial judge's findings that Kluang Wood's inability to service the interest on the bridging loan was due to Hong Leong's failure to secure and provide the end-finance; the agreement between Hong Leong and Kluang Wood contained in the letter placed upon Hong Leong an obligation to secure and provide the end-finance; Pang had represented the provision of end-finance and that it would be a certainty; and the representations were negligently made and/or were capable in law of giving rise to a collateral warranty.

Held, allowing Kluang Wood's appeal and dismissing Hong Leong's cross-appeal:

(1) (Per **Lamin PCA**) Since the management committee clearly approved both the bridging loan and the end-financing, the clear wording of the approval must be given effect to. The condition that stated that the 'total end-financing facilities to be syndicated by HLFB' must be capable of conveying the meaning that the first respondent undertook to organize and to make available the said facilities. Pang's oral representation substantiated by the certainty of availability of the end-finance conveyed by the letter of 26 October 1983 together with the undisputed fact that no end-finance at all was available must constitute a fundamental breach by the first respondent that went to the root of the contract (see p 210D–H).

(2) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Hong Leong's contractual obligations could properly be ascertained from its letter of offer which Kluang Wood had accepted. This letter showed Hong Leong's commitment to the end-finance of RM26m as it stated that Hong Leong had 'approved' the end-finance of RM26m. There was nothing in the letter indicating the approval being subject to any condition precedent or to Hong Leong being able to get the syndicated loan. In the circumstance, all such terms and conditions in the letter relating to the management of the end-finance by Hong Leong, the total amount of the end-finance to be syndicated and Hong Leong's participation therein reinforced the stipulation that the end-finance would be furnished (see pp 220I and 221A–C).

(3) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The representations contended to have been made by Pang to Chew were that for a financial institution like Hong Leong to procure a syndicated end-finance of RM21m would present no problem and that the availability of the syndicated loan was not qualified. Relying on the aforesaid representations, Kluang Wood applied for and obtained approval of the facilities including the availability of the syndicated end-finance. Since Chew was not challenged about Pang making the representations and Pang did not give evidence, the learned trial judge was justified in concluding that Pang had made the representations and that they were 'unrebutted and unchallenged' (see p 221D–H).

(4) (Per **Chong Siew Fai CJ (Sabah & Sarawak)** and **Mohamed Dzaiddin FCJ**) It was stipulated that the end-finance would be 'drawdown in proportion to the work-in-progress as certified by the project's architect'. However, there was no evidence to show that the architect's certificate required under the said letter had been issued. On the evidence, the first drawdown might have been furnished had the requisite certificate been issued. Therefore, no blame ought to be attributed to Hong Leong.

This, however, did not apply to Hong Leong's total failure of making available the end-finance after the first quarter of 1984. In this respect, there had been a fundamental breach by Hong Leong that went to the root of the contract. The trial judge rightly found that failure of the project was not due to any poor planning and mismanagement thereof. Hong Leong could not use the lack of architect's certificates as an excuse for its own fundamental failure (see pp 221I and 222A–F).

(5) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Although the notes of evidence did not show that Chew had used the word 'certainty' in his testimony, it was not unfair or unreasonable for the trial judge to conclude that what Pang had represented to Chew gave the latter the impression of certainty of the availability of the end-finance. The facts and the circumstances and the manner in which the trial judge treated the representations showed that she was fully aware that a case of making statements negligently had to be made out. The trial judge was right in finding that Pang had been negligent in making the statements upon which Kluang Wood had acted (see pp 223A–C and 225E); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 followed.

(6) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) If additional evidence on the collateral warranties fall within the scope of proviso (b) to s 92 of the Evidence Act 1950, it may be admitted in evidence. In considering whether the proviso applies, the nature of the written agreement and its surrounding

circumstances must be considered. The matters about certainty of the end-finance and Pang's utterances giving rise to the impression of such certainty are not in the letter. Further, the utterance about the timing of the first drawdown was admissible as no time-frame about the first drawdown was given in the said letter. As a result of breach of the collateral warranty by Hong Leong, the trial judge rightly held that the failure of the project was due to unavailability of the end-finance (see p 226D–H).

(7) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Hong Leong's plea was in fact a plea of res judicata by way of estoppel to the two entire causes of actions. In the face of such allegations by Hong Leong, the trial judge and this court were entitled to look at the reasons for the decision and the notes of evidence of the trial judge in the Johor Bahru suit to determine whether the two questions constituting the causes of actions had been determined. However, the grounds or reasons for the decision in the Johor Bahru suit were not exhibited in this case. Hence, it had not been established that the two questions or causes of action had been adjudicated upon, the burden of which lies on the party who alleges it, ie Hong Leong (see p 228D–G).

(8) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) The point on whether Kluang Wood and Chew were estopped from raising the second claim of fraudulent or improper exercise of power of auction sale on the ground that such claim could have been raised as a counterclaim in the charge action commenced by Hong Leong against Kluang Wood need not be dealt with. The auction sale under which the fraudulent or improper exercise of the power of sale was alleged to have arisen took place after the making of the sale order. Therefore, the allegations could not possibly be raised in the charge action. Further, the trial judge had held that the allegations constituting the second claim failed; and the appeal relating to this second claim had been abandoned. Therefore, the contention had no merit and must fail (see p 230D–G).

(9) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) Whether there is sufficient connection to constitute privity of interest would depend on an examination of the interests of the parties and the fairness of binding them by a decision in which they were not represented. With regards to Kluang Wood, there was no valid ground for holding that Kluang Wood was in privity of interest with Chew in the Johor Bahru suit or that they were so linked as to make the doctrine of res judicata applicable (see p 232D–E).

(10) (Per **Chong Siew Fai CJ (Sabah & Sarawak)**) An agent who has contracted for a disclosed and named principal cannot sue on the contract. This is so even if he is the real principal, unless the other party has affirmed the contract with knowledge of that

fact. In the instant case, Chew, to the knowledge of Hong Leong, negotiated for Kluang Wood throughout. The right of action to which the collateral warranty gives rise is personal as between the two contracting parties concerned. As between them, breach of the warranty may form the basis of an action for damages, but it does not normally entitle a non-contracting party to sue thereon. Therefore, Chew could not sue on the two causes of action (see pp 232H–I and 233A).

Cases referred to (majority judgments)

Antonio Dias Caldeira v Frederick Augustus Gray [1936] MLJ 110 (refd)
Benmax v Austine Motor Co Ltd [1955] 1 All ER 326 (refd)
Bickerton v Burrell (1816) 5 M & S 383 (refd)
Box v Midland Bank Ltd [1979] 2 Lloyd's Rep 391 (refd)
Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853 (refd)
Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor [1992] 1 MLJ 23 (refd)
Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41 (refd)
Clarke v Edinburgh Tramways Co 1919 SC 35 (refd)
Collins v Hopkins [1923] 2 KB 617 (refd)
Esso Petroleum Co Ltd v Mardon [1976] 2 All ER 5 (refd)
Evans v Hooper [1875] 1 QBD 45 (refd)
Fairlie v Fenton (1870) LR 5 Exch 169 (refd)
Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54 (refd)
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465 (folld)
House of Spring Gardens Ltd v Waite & Ors [1991] 1 QB 241 (refd)
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)
Miller v Cannon Hill Estates Ltd [1931] 2 KB 113 (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126 (refd)
Otto v Bolton [1936] 2 KB 46 (refd)
Randolph v Tuck [1961] 1 All ER 814 (refd)
Rayner v Grote (1846) 15 M & W 359 (refd)
TP Jordeson & Co and Kahn v London Hardwood Co Ltd (1913) 110 LT 666 (refd)
Tan Chong & Sons Motor Co Ltd v Yang Chin Lang [1967] 1 MLJ 123 (refd)
Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220 (refd)
Thomas v Thomas [1947] AC 484 (refd)

(11) (Per **Mohamed Dzaiddin FCJ**, dissenting) The first appellant was not a party to the Johor Bahru suit, whereas the second appellant was a party in both proceedings. The real question was the interest which the first appellant had in the subject matter of the Johor Bahru suit. The first appellant was the

principal debtor under the bridging loan. The second appellant was a director of the first appellant as well as one of the guarantors of the bridging loan upon which he was sued in the Johor Bahru High Court. Clearly, the first appellant must not only be well aware of the proceedings, but also have special interest in the outcome of the said proceedings. Hence, there was a privity of interest between the first and second appellants in the Johor Bahru suit (see pp 243H–I and 244A).

(12) (Per **Mohamed Dzaiddin FCJ**, dissenting) Since the second appellant was personally involved in the negotiations for the banking facilities on behalf of the first appellant, there was no excuse for him not to give proper and adequate instructions to the solicitors regarding the alleged representations made by Pang about the end-financing. No compelling reason had been advanced to show that the issue could not have been pleaded in the Johor Bahru suit except to contend that since the first appellant was not a party to the Johor Bahru suit, they were not estopped from bringing a separate action against the respondents for negligent misrepresentation. The subject matter of the appellants' claim in the present proceedings could and should have been pleaded in the defence in the Johor Bahru suit or raised as a triable issue under the O 14 application in the Johor Bahru suit. It would be an abuse of the process of the court to allow the first appellant to bring a new proceeding in respect of the same issue. As such, the appeal should be dismissed (see pp 245I and 246A–D).

(13) (Per **Mohamed Dzaiddin FCJ**) The approval of end-finance of RM26m to the first appellant must be subject to the participation of the other financial institutions in the syndication of the said end-finance. Since the said syndication did not materialize and no participation agreement was executed between the first respondent as syndicate leader and the other lenders, it is wrong for the court to hold the first respondent liable to the first appellant under the agreement. The finding of the trial judge that the conduct of the first respondent in preparing the placement memorandum and using it to invite potential financial institutions to participate in the syndication of the end-finance facility amounted to giving an unqualified commitment to the first appellant to make available the end-finance loan subject to the terms and conditions of the agreement was misconceived. The trial judge failed to appreciate the legal concept of loan syndication, especially the purpose of a placement memorandum. The preparation of a placement memorandum is a condition precedent to a commitment to lend by the participating financial institutions (see p 249C–F).

(14) (Per **Mohamed Dzaiddin FCJ**) The trial judge misdirected herself in the appreciation of Chew's evidence. Nowhere in the evidence was it said that Pang had represented to him about the first respondent securing the end-finance for the first appellant and the first drawdown would be on the first quarter of 1984. Pang never represented to Chew about the certainty of the first respondent securing the end-finance for the first appellant. The impression formed by Chew did not amount to a representation, nor could it be implied that a warranty had been given by Pang (see pp 252I and 253A–E).

Even if Chew's evidence was accepted, such statement or representation could not be promissory in nature. For the representation to be converted into a promise, there ought to be clearer evidence from Chew on what Pang actually said during the course of their discussion. It was unlikely for Pang, being an experienced banker, to give an assurance or promise that the first defendant would secure the end-financing facility. The trial judge had erred in finding that Pang's statement amounted to a warranty and there was a breach of it (see pp 254F–H and 256A).

Cases referred to (dissenting judgment)

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189 (refd)

Brisbane City Council & Myer Shopping Centres Pty Ltd v Attorney-General for Queensland [1978] 3 WLR 299 (refd)

Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853 (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90 (refd)

Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd [1965] 2 All ER 65 (refd)

Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119 (refd)

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54 (refd)

Greenhalgh v Mallard [1947] 2 All ER 255 (refd)

Henderson v Henderson (1843) 3 Hare 100 (refd)

House of Spring Gardens Ltd v Waite & Ors [1991] 1 QB 241 (refd)

JJ Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435 (refd)

Ross v Allis-Chalmers Australia Pty Ltd (1980) 55 ALJR 8 (refd)

Tan Chong & Sons Motors Co (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220 (refd)

Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16 (refd)

Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 (refd)

Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581 (refd)

[Bahasa Malaysia summary

Perayu pertama ('Kluang Wood') adalah pemaju perumahan yang berlesen dan tuan punya berdaftar sebidang tanah di Johor ('tanah tersebut'). Perayu kedua ('Chew') adalah pengarah perayu pertama. Chew telah diperkenalkan kepada seorang bernama WP Pang ('Pang') yang merupakan pengurus serantau selatan penentang pertama ('Hong Leong'). Pada awal tahun 1983, perayu-perayu telah berunding dengan Hong Leong untuk mendapatkan kemudahan-kemudahan perbankan bagi membolehkan mereka membangunkan tanah tersebut menjadi sebuah kawasan perumahan. Satu permohonan rasmi telah dibuat, memohon RM4.5 juta sebagai pinjaman penyambungan dan RM21 juta sebagai pembiayaan akhir. Menurut Chew, ketika perundingan antara beliau dan Pang, Pang telah bersetuju bahawa Hong Leong akan memberikan Kluang Wood pinjaman penyambungan dan pembiayaan akhir bersindiket. Pang telah membuat representasi kepada beliau semasa perundingan mereka bahawa bagi sebuah syarikat kewangan yang mempunyai reputasi seperti Hong Leong, jumlah pembiayaan akhir dan pinjaman penyambungan tidak akan menjadi masalah. Pada 26 Oktober 1983, defendan pertama telah meluluskan permohonan tersebut melalui sepucuk surat kelulusan. Melalui surat tersebut, Hong Leong telah dengan nyata atau secara tersirat membuat representasi kepada Kluang Wood bahawa satu pinjaman penyambungan sebanyak RM3.5 juta dan kemudahan pembiayaan akhir sebanyak RM26 juta telah diluluskan, dengan bahagian Hong Leong bagi pembiayaan akhir tersebut sebanyak RM5 juta. Kluang Wood memplidkan bahawa Hong Leong telah selanjutnya membuat representasi bahawa penggunaan pinjaman awal kemudahan pembiayaan akhir tersebut adalah pada suku tahun pertama bagi tahun 1984. Sebagai jaminan bagi pinjaman penyambungan tersebut Kluang Wood telah mewujudkan satu gadaian ke atas tanah tersebut atas nama Hong Leong dan Chew serta pengarah-pengarah lain telah menyempurnakan surat gerenti. Dalam bulan Januari 1984, Hong Leong telah menyediakan memorandum penempatan untuk pensindiketan pembiayaan akhir sebanyak RM26 juta.

Walau bagaimanapun, tiada pembiayaan akhir sama sekali, termasuk RM5 juta daripada Hong Leong telah diadakan bagi Kluang Wood sungguhpun pinjaman pembiayaan sebanyak RM3.5 juta telah digunakan sepenuhnya oleh Kluang Wood. Hong Leong kemudiannya mengeluarkan satu writ terhadap penggerenti-penggerenti termasuk Chew untuk mendapatkan kembali pinjaman penyambungan tersebut ('guaman Johor Bahru'). Penghakiman muktamad di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 telah diperolehi terhadap Chew dan penggerenti-penggerenti yang lain. Hong Leong telah juga diberikan satu perintah untuk jualan tanah tersebut, yang kemudiannya telah dijualkan kepada penentang kedua, sebuah anak syarikat yang dimiliki sepenuhnya oleh Hong Leong. Berdasarkan perkara ini, perayu-perayu mendakwa bahawa

Hong Leong telah bertindak dengan niat jahat dan/atau secara fraud dalam melaksanakan kuasa jualannya iaitu ia telah pada setiap masa berniat untuk membeli tanah tersebut dengan sendirinya atau melalui ejensi pihak yang lain. Walau bagaimanapun, bahagian rayuan tersebut telah ditinggalkan oleh perayu-perayu.

Perayu-perayu menuntut bahawa kegagalan Hong Leong untuk menyediakan pembiayaan akhir sebanyak RM26 juta sepertimana yang dikemukakan dalam suratnya bertarikh 26 Oktober 1983 menyebabkan kegagalan projek tersebut dan juga membuat Kluang Wood tidak dapat membayar faedah ke atas pinjaman penyambungan tersebut. Mereka selanjutnya mendakwa bahawa Hong Leong adalah cuai dan bertindak dalam kemungkiran akan kewajipannya apabila ia membuat representasi kepada Kluang Wood bahawa pembiayaan akhir sebanyak RM26 juta akan disediakan kepada pembeli-pembeli rumah dan bahawa penggunaan pinjaman yang pertama akan dilakukan pada suku tahun yang pertama tahun 1984. Mereka juga memplidkan bahawa representasi Hong Leong membentuk satu waranti kolateral dan dalam kemungkiran waranti tersebut, Hong Leong telah menyebabkan kerugian dan kerosakan kepada mereka. Penentang-penentang berhujah bahawa mereka tidak terhutang sebarang kewajipan berjaga-jaga kepada perayu-perayu mengenai representasi yang dikatakan. Mereka menghujahkan bahawa perayu-perayu telah diestop daripada melitigasikan kausa tindakan utama dalam guaman atas alasan res judicata, kerana isu-isu yang dibangkitkan oleh perayu-perayu telah pun dilitigasikan oleh Hong Leong dalam guaman Johor Bahru.

Hakim perbicaraan telah mendapati bahawa Hong Leong telah membuat representasi kepada Kluang Wood bahawa mengadakan pembiayaan akhir tersebut adalah suatu kepastian, bahawa penggunaan pinjaman yang pertama daripada pembiayaan akhir itu akan dapat dilakukan pada suku pertama tahun 1984, dan bahawa dalam membuat representasi itu Pang telah bertindak cuai. Representasi lisan Pang telah diputuskan sebagai membentuk satu waranti kolateral yang telah dimungkiri apabila tiada apa-apa bahagian pembiayaan akhir diberikan oleh Hong Leong. Hakim perbicaraan juga memutuskan bahawa hujah res judicata Hong Leong berjaya iaitu tuntutan-tuntutan Kluang Wood dan Chew dalam tindakan ini atas salah nyata cuai dan secara alternatifnya bagi kemungkiran waranti kolateral tidak boleh dilitigasikan kerana terdapatnya kepentingan privity antara Kluang Wood dan Chew dalam guaman Johor Bahru, yang mana Chew merupakan seorang pengarah dan ejen bagi Kluang Wood. Hakim perbicaraan telah menolak tindakan perayu-perayu, terhadap yang mana perayu-perayu telah merayu. Hong Leong telah membuat rayuan balas terhadap keputusan hakim perbicaraan bahawa ketidakupayaan Kluang Wood untuk membayar faedah ke atas pinjaman penyambungan adalah disebabkan oleh kegagalan Hong Leong untuk mendapatkan dan

menyediakan pembiayaan akhir tersebut; perjanjian antara Hong Leong dan Kluang Wood yang terkandung di dalam surat tersebut telah meletakkan ke atas Hong Leong suatu kewajipan untuk mendapatkan serta menyediakan pembiayaan akhir tersebut; Pang telah membuat representasi bagi peruntukan pembiayaan akhir tersebut dan bahawa ia adalah suatu kepastian; dan representasi tersebut telah dibuat secara cuai dan/atau di sisi undang-undang berkeupayaan membangkitkan satu waranti kolateral.

Diputuskan, membenarkan rayuan perayu pertama dan menolak tindakan perayu kedua dan rayuan balas penentang pertama:

(1) (Oleh **Lamin PMR**) Oleh kerana jawatankuasa pengurusan dengan jelasnya telah meluluskan kedua-dua pinjaman penyambungan dan pembiayaan akhir, penyusunan kata kelulusan tersebut yang nyata haruslah dikuatkuasakan. Syarat yang menyatakan bahawa 'total end-financing facilities to be syndicated by HLFB' semestinya berkeupayaan untuk menyampaikan maksud bahawa defendan pertama telah mengakujanji untuk menganjurkan dan mengadakan kemudahan-kemudahan tersebut. Representasi lisan Pang yang disokong oleh kepastian mengenai ketersediaan pembiayaan akhir yang disampaikan melalui surat bertarikh 26 Oktober 1983 bersama-sama dengan fakta yang tidak dapat dipertikaikan bahawa tiada pembiayaan akhir sama sekali telah disediakan sudah pasti membentuk satu kemungkiran asas oleh defendan pertama yang sampai sehingga kepada dasar kontrak tersebut (lihat ms 210D–H).

(2) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Kewajipan kontraktual Hong Leong boleh dikatakan suatu kepastian berdasarkan surat tawarannya yang telah diterima oleh Kluang Wood. Surat ini menunjukkan komitmen Hong Leong kepada pembiayaan akhir sebanyak RM26 juta kerana ia menyatakan bahawa Hong Leong telah 'meluluskan' pembiayaan akhir sebanyak RM26 juta. Tidak terdapat apa-apa pun dalam surat itu yang menunjukkan kelulusan ini adalah tertakluk kepada sebarang syarat terdahulu atau kepada kebolehan Hong Leong untuk mendapatkan pinjaman bersindiket tersebut. Dalam keadaan ini, kesemua terma dan syarat sedemikian dalam surat tersebut berhubung dengan pengurusan pembiayaan akhir oleh Hong Leong, jumlah penuh pembiayaan akhir untuk disindiketkan dan penyertaan Hong Leong di dalamnya memperkukuhkan syarat bahawa pembiayaan akhir tersebut akan diberikan (lihat ms 220I dan 221A–C).

(3) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Representasi yang dihujahkan sebagai telah dibuat oleh Pang kepada Chew adalah bahawa untuk memperolehi pembiayaan akhir bersindiket

sebanyak RM21 juta bagi sebuah institusi kewangan seperti Hong Leong tidak merupakan sebarang masalah dan bahawa ketersediaan pinjaman bersindiket adalah tidak bersyarat. Bergantung pada representasi tersebut, Kluang Wood telah memohon bagi mendapatkan dan telah memperolehi kelulusan bagi kemudahan-kemudahan tersebut termasuk ketersediaan pembiayaan akhir bersindiket. Oleh kerana Chew tidak dicabar mengenai representasi yang dibuat oleh Pang dan Pang tidak memberi keterangan, hakim perbicaraan yang arif berjustifikasi dalam memutuskan bahawa Pang telah membuat representasi tersebut dan bahawa ia 'tidak dipatahkan dan dicabar' (lihat ms 221D–H).

(4) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)** dan **Mohamed Dzaiddin HMP**) Ia telah ditetapkan bahawa pembiayaan akhir tersebut adalah 'drawdown in proportion to the work-in-progress as certified by the project's architect'. Walau bagaimanapun, tidak terdapat keterangan bagi menunjukkan bahawa sijil arkitek yang diperlukan di bawah surat tersebut telah dikeluarkan. Menurut keterangan, penggunaan pinjaman pertama mungkin telah diberikan sekiranya sijil yang diperlukan itu telah dikeluarkan. Dengan itu, Hong Leong tidak seharusnya dipersalahkan.

Walau bagaimanapun, ini tidak terpakai kepada kegagalan Hong Leong yang sepenuhnya bagi menyediakan pembiayaan akhir selepas suku tahun yang pertama tahun 1984. Sehubungan dengan perkara ini, terdapat kemungkiran asas oleh Hong Leong yang menjejaskan dasar kontrak tersebut. Hakim perbicaraan dengan tepatnya mendapati bahawa kegagalan projek tersebut bukannya disebabkan oleh perancangan yang lemah serta salah pengurusannya. Hong Leong tidak boleh mempergunakan ketiadaan sijil arkitek sebagai alasan bagi kegagalannya yang asas itu (lihat ms 221I dan 222A–F).

(5) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Walaupun nota-nota keterangan tidak menunjukkan bahawa Chew telah menggunakan perkataan 'certainty' dalam keterangannya, ia bukanlah tidak adil atau tidak munasabah untuk hakim perbicaraan memutuskan bahawa apa yang telah digambarkan oleh Pang kepada Chew telah memberikan Chew tanggapan kepastian mengenai ketersediaan pembiayaan akhir tersebut. Fakta-fakta dan keadaan-keadaan serta cara bagaimana hakim perbicaraan telah menghuraikan representasi tersebut menunjukkan bahawa beliau amat mengetahui bahawa sesuatu kes membuat pernyataan-pernyataan dengan cuainya hendaklah diandaikan. Hakim perbicaraan telah bertindak dengan betul dalam memutuskan bahawa Pang cuai ketika membuat pernyataan-pernyataan atas yang mana Kluang Wood telah mengambil tindakan (lihat ms 223A–C dan 225E); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 diikut.

(6) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Jika keterangan tambahan mengenai waranti-waranti kolateral jatuh di dalam lingkungan proviso (b) s 92 Akta Keterangan 1950, ia boleh dimasukkan sebagai keterangan. Dalam mempertimbangkan sama ada proviso tersebut terpakai, sifat perjanjian bertulis dan keadaan-keadaan di sekelilingnya haruslah dipertimbangkan. Perkara-perkara mengenai kepastian pembiayaan akhir dan pernyataan Pang yang membangkitkan tanggapan mengenai kepastian yang sedemikian tidak terdapat dalam surat tersebut. Selanjutnya, pernyataan mengenai masa penggunaan pinjaman yang pertama boleh diterima kerana tiada tempoh masa mengenai penggunaan pinjaman yang pertama telah diberikan dalam surat tersebut. Akibat kemungkiran waranti kolateral tersebut oleh Hong Leong, hakim perbicaraan telah memutuskan dengan betulnya bahawa kegagalan projek tersebtut adalah disebabkan ketidaksediaan pembiayaan akhir (lihat ms 226D–H).

(7) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Rayuan Hong Leong pada hakikatnya merupakan satu penghujahan res judicata melalui estopel kepada kedua-dua kausa tindakan secara menyeluruh. Memandangkan pengataan-pengataan sedemikian oleh Hong Leong, hakim perbicaraan serta mahkamah ini berhak untuk melihat alasan-alasan bagi keputusan tersebut dan nota-nota keterangan hakim perbicaraan dalam guaman Johor Bahru bagi menentukan sama ada dua persoalan tersebut yang membentuk kausa-kausa tindakan telah diputuskan. Walau bagaimanapun, alasan atau sebab bagi keputusan dalam guaman Johor Bahru tidak diekshibitkan dalam kes ini. Dengan itu, ia telah tidak ditentukan bahawa dua persoalan atau kausa tindakan tersebut telah pun dihakimi, beban terletak pada pihak yang mendakwanya, iaitu Hong Leong (lihat ms 228D–G).

(8) Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Perkara mengenai sama ada Kluang Wood dan Chew telah diestop daripada membangkitkan tuntutan kedua mengenai fraud atau pelaksanaan kuasa jualan lelong yang tidak wajar atas alasan bahawa tuntutan sedemikian mungkin telah dibangkitkan sebagai satu tuntutan balas dalam tindakan gadaian yang dimulakan oleh Hong Leong terhadap Kluang Wood tidak perlu diuruskan. Jualan lelong di bawah yang mana perbuatan fraud atau pelaksanaan kuasa jualan yang tidak wajar didakwa telah berbangkit berlaku selepas perintah jualan dibuat. Dengan itu, tohmahan tersebut tidak mungkin boleh dibangkitkan dalam tindakan gadaian tersebut. Selanjutnya, hakim perbicaraan telah memutuskan bahawa dakwaan-dakwaan yang membentuk tuntutan kedua telah gagal; dan rayuan berhubung tuntutan kedua ini telah ditinggalkan. Dengan itu, penghujahan tersebut tidak mempunyai merit dan pasti gagal (lihat ms 230D–G).

(9) (Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Sama ada terdapatnya perkaitan yang memadai untuk membentuk kepentingan privity akan bergantung pada pemeriksaan kepentingan pihak-pihak dan keadilan mengikat mereka dengan satu keputusan dalam mana mereka tidak diwakili. Berhubung Kluang Wood, tidak terdapat alasan yang sah untuk memutuskan bahawa Kluang Wood berada dalam kepentingan privity dengan Chew dalam guaman Johor Bahru atau mereka dikaitkan sedemikian sehingga menjadikan doktrin res judicata terpakai (lihat ms 232D–E).

(10)(Oleh **Chong Siew Fai HB (Sabah & Sarawak)**) Ejen yang telah mengikat kontrak bagi pihak utama yang didedahkan dan dinamakan tidak boleh mendakwa atas kontrak tersebut. Ini adalah sedemikian walaupun jika beliau adalah pihak utama yang sebenarnya, melainkan pihak yang lain itu telah mengikrarkan kontrak tersebut dengan mengetahui fakta sebenarnya. Dalam kes ini, Chew, dengan pengetahuan Hong Leong, telah berunding untuk Kluang Wood sepanjang masa. Hak tindakan yang dibangkitkan oleh waranti kolateral tersebut adalah persendirian antara kedua-dua pihak berkenaan yang mengikat kontrak tersebut. Antara mereka, kemungkiran waranti tersebut boleh membentuk dasar sesuatu tindakan untuk ganti rugi, tetapi biasanya ia tidak membenarkan pihak yang tidak mengikat kontrak untuk membuat dakwaan ke atasnya. Dengan itu, Chew tidak boleh mendakwa atas kedua-dua kausa tindakan tersebut (lihat ms 232H–I dan 233A).

(11)(Oleh **Mohamed Dzaiddin HMP**, menentang) Perayu pertama bukannya satu pihak kepada guaman Johor Bahru, sedangkan perayu kedua adalah pihak dalam kedua-dua prosiding. Persoalan sebenar adalah kepentingan perayu pertama dalam hal perkara guaman Johor Bahru. Perayu pertama merupakan penghutang utama di bawah pinjaman penyambungan tersebut. Perayu kedua adalah seorang pengarah perayu pertama dan juga salah seorang penggerenti bagi pinjaman penyambungan di atas yang mana beliau didakwa dalam Mahkamah Tinggi Johor Bahru. Jelasnya, perayu pertama bukan sahaja perlu mengetahui sesungguhnya mengenai prosiding tersebut, tetapi juga mempunyai kepentingan khas dalam keputusan prosiding tersebut. Justeru itu, terdapat kepentingan privity antara perayu-perayu pertama dan kedua dalam guaman Johor Bahru (lihat ms 243H–I dan 244A).

(12)(Oleh **Mohamed Dzaiddin HMP**) Oleh kerana perayu kedua terlibat secara peribadi dalam perundingan-perundingan bagi kemudahan-kemudahan perbankan bagi pihak perayu pertama, tiada sebarang alasan bagi beliau untuk tidak memberikan arahan yang wajar dan secukupnya kepada peguamcara berhubung dengan reprsentasi yang dikatakan yang dibuat oleh Pang mengenai pembiayaan akhir tersebut. Tiada alasan mendorong telah dikemukakan bagi menunjukkan bahawa isu tersebut tidak

mungkin telah diplidkan dalam guaman Johor Bahru kecuali untuk menghujahkan bahawa oleh kerana perayu pertama bukannya merupakan satu pihak kepada guaman Johor Bahru, mereka tidak diestop daripada memulakan satu tindakan berasingan terhadap defendan-defendan bagi salah nyata cuai. Hal perkara tuntutan perayu-perayu dalam prosiding semasa boleh dan seharusnya diplidkan dalam pembelaan dalam guaman Johor Bahru atau dibangkitkan sebagai isu yang boleh dibicarakan di bawah permohonan A 14 dalam guaman Johor Bahru. Ia merupakan satu penyalahgunaan proses mahkamah untuk membenarkan perayu pertama memulakan prosiding baru berhubung dengan isu yang sama. Oleh yang demikian, rayuan seharusnya ditolak (lihat ms 245I dan 246A–D).

(13)(Oleh **Mohamed Dzaiddin HMP**) Kelulusan pembiayaan akhir sebanyak RM26 juta kepada perayu pertama semestinya tertakluk kepada penyertaan institusi-institusi kewangan yang lain dalam pensindiketan pembiayaan akhir tersebut. Oleh kerana pensindiketan tersebut tidak menjadi kenyataan dan tiada perjanjian penyertaan telah disempurnakan antara penentang pertama sebagai ketua sindiket dan pemberi-pemberi pinjaman yang lain, adalah salah bagi mahkamah untuk memutuskan penentang pertama bertanggungan kepada perayu pertama di bawah perjanjian tersebut. Keputusan hakim perbicaraan bahawa perlakuan penentang pertama dalam menyediakan memorandum penempatan dan menggunakannya untuk menjemput bakal institusi-institusi kewangan supaya menyertai pensidiketan kemudahan pembiayaan akhir sama seperti memberikan komitmen yang tidak bersyarat kepada perayu pertama untuk mengadakan pinjaman pembiayaan akhir itu tertakluk kepada terma dan syarat perjanjian tersebut adalah disalah-tafsirkan. Hakim perbicaraan gagal untuk mempertimbangkan konsep undang-undang pensindiketan pinjaman tersebut, khasnya tujuan sesuatu memorandum penempatan. Penyediaan memorandum penempatan adalah syarat terdahulu kepada komitmen untuk memberikan pinjaman oleh institusi-institusi kewangan yang menyertai (lihat ms 249C–F).

(14)(Oleh **Mohamed Dzaiddin HMP**) Hakim perbicaraan telah tersalah arah dirinya sendiri dalam penilaian keterangan Chew. Tidak di mana-mana pun dalam keterangan yang menyatakan bahawa Pang telah membuat representasi kepada beliau mengenai penentang pertama memperolehi pembiayaan akhir tersebut untuk perayu pertama dan penggunaan pinjaman pertama akan dapat dilakukan pada suku tahun pertama tahun 1984. Pang tidak pernah membuat representasi kepada Chew mengenai kepastian penentang pertama untuk memperolehi pembiayaan akhir tersebut bagi perayu pertama. Tanggapan yang dibentuk oleh Chew tidak sama seperti suatu representasi, dan ia juga tidak tersirat bahawa satu waranti telah diberikan oleh Pang (lihat ms 252I dan 253A–E).

Sungguhpun jika keterangan Chew diterima, pernyataan atau representasi yang sedemikian tidak boleh mempunyai sifat janji. Untuk menukar representasi tersebut supaya menjadi satu janji, haruslah terdapat keterangan yang lebih jelas daripada Chew mengenai apakah sebenarnya yang diperkatakan oleh Pang semasa perundingan mereka. Ia tidak mungkin bagi Pang, sebagai seorang jurubank yang berpengalaman, untuk memberikan kepastian atau janji bahawa penentang pertama akan memperolehi kemudahan pembiayaan akhir. Hakim perbicaraan telah tersalah pertimbangan dalam memutuskan bahawa pernyataan Pang sama seperti satu waranti dan terdapat kemungkiran atasnya (lihat ms 254F–H dan 256A).]

Notes

For cases on fundamental breach, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1648–1649.

For cases on construction of terms of contract for loan, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1918–1919.

For a case on negligent misrepresentation, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) para 2592.

For a case on pre-contract promise, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) para 1255.

For a case on cause of action estoppel, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) para 3967.

For a case on principal and agent, see 3 *Mallal's Digest* (4th Ed, 1997Reissue) para 1541.

Complete list of cases referred to

Antonio Dias Caldeira v Frederick Augustus Gray [1936] MLJ 110

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189

Benmax v Austine Motor Co Ltd [1955] 1 All ER 326

Bickerton v Burrell (1816) 5 M & S 383

Box v Midland Bank Ltd [1979] 2 Lloyd's Rep 391

Brisbane City Council & Myer Shopping Centres Pty Ltd v Attorney-General for Queensland [1978] 3 WLR 299

Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2) [1967] 1 AC 853

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1988] 3 MLJ 90

Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor [1992] 1 MLJ 23

Chow Yee Wah & Anor v Choo Ah Pat [1978] 2 MLJ 41

Clarke v Edinburgh Tramways Co 1919 SC 35

Collins v Hopkins [1923] 2 KB 617

Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd [1965] 2 All ER 65
Esso Petroleum Co Ltd v Mardon [1976] 2 All ER 5
Evans v Hooper [1875] 1 QBD 45
Fairlie v Fenton (1870) LR 5 Exch 169
Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54
Greenhalgh v Mallard [1947] 2 All ER 255
Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465
Henderson v Henderson (1843) 3 Hare 100
House of Spring Gardens Ltd v Waite & Ors [1991] 1 QB 241
JJ Savage & Sons Pty Ltd v Blakney (1970) 119 CLR 435
Kandiah Peter v Public Bank Bhd [1994] 1 MLJ 119
Miller v Cannon Hill Estates Ltd [1931] 2 KB 113
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126
Otto v Bolton [1936] 2 KB 46
Randolph v Tuck [1961] 1 All ER 814
Rayner v Grote (1846) 15 M & W 359
Ross v Allis-Chalmers Australia Pty Ltd (1980) 55 ALJR 8
TP Jordeson & Co and Kahn v London Hardwood Co Ltd (1913) 110 LT 666
Tan Chong & Sons Motor Co Ltd v Yang Chin Lang [1967] 1 MLJ 123
Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight [1983] 1 MLJ 220
Tan Swee Hoe Co Ltd v Ali Hussain Bros [1980] 2 MLJ 16
Thomas v Thomas [1947] AC 484
Tindok Besar Estate Sdn Bhd v Tinjar Co [1979] 2 MLJ 229
Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor [1975] AC 581

Legislation referred to

Evidence Act 1950 s 92(b), (c)
Rules of the High Court 1980 O 14
Rules of the Supreme Court O 18 r 19 [UK]

Appeal from: Civil Suit No D2–22–150 of 1988 (High Court, Kuala Lumpur)

Manjit Singh (*Fiona Bodipalar* with him) (*Sri Ram & Co*) for the appellants.

Cecil Abraham (*RS Nathan* with him) (*Shearn Delamore & Co*) for the respondents.

24 October 1998

Lamin PCA: I have had the opportunity of reading the draft judgments of my learned brothers Chong Siew Fai CJ (Sabah & Sarawak) and Mohamed Dzaiddin FCJ. My learned brother Mohamed Dzaiddin FCJ concluded

that the plaintiffs' appeal should be dismissed and the defendants' cross-appeal be allowed. My learned brother Chong Siew Fai CJ (Sabah & Sarawak) on the other hand chose to allow the first plaintiff's (Kluang Wood) appeal and that damages be assessed. As for Chew, the second plaintiff, his action was to stand dismissed. The cross-appeal by the first defendant (Hong Leong Finance) (to the extent relating to Kluang Wood) be dismissed.

As for myself, I am inclined to agree with the finding of my learned brother Chong Siew Fai CJ (Sabah & Sarawak) and his reasoning in this appeal. However, may I take the liberty to observe on the construction of the letter dated 26 October 1983 (AB17–22) which was central to the issues raised in this appeal. My learned brother Mohamed Dzaiddin FCJ said that the critical question here was whether the first defendant was legally obliged to secure the syndication of the end-financing of RM26m. With the greatest of respect, the management committee approved both the bridging loan and the end-financing. The opening paragraph of the aforesaid letter is quite clear for it states:

> We refer to your loan application and are pleased to confirm that our management committee has approved your bridging loan of RM3.5m *and* end-finance of RM26m subject to the following terms and conditions. (Emphasis added.)

I fail to appreciate how this sentence is to be read otherwise than that of the approval of the two items, namely the bridging loan of RM3.5m and end-finance of RM26m.

The clear wording of the approval must be given effect to. The aforesaid letter of 26 October 1983 further stipulates the following conditions:

> Total end-financing facilities *to be syndicated by HLFB* is RM26m. HLFB will provide facilities of up to RM5m. (Emphasis added.)

The first condition states that the 'total end-financing facilities to be syndicated by HLFB' and this, in my view, must be capable of conveying the meaning that the first defendant (HLFB) undertook to organize and to make available the said facilities. The aforesaid condition does not state that the first defendant 'shall endeavour' to organize and to make available the required syndicated loans. Pang's oral representation substantiated by the certainty of availability of the end-finance conveyed by the letter of 26 October 1983 together with the undisputed fact that no end-finance at all was available must necessarily constitute a fundamental breach by the first defendant (HLFB) that went to the root of the contract. In effect, therefore, the finding of the learned trial judge was not really misconceived.

With regard to the defence of res judicata, I say nothing more as I am in complete agreement with my learned brother Chong Siew Fai CJ (Sabah & Sarawak). So also in regard to the costs of this appeal.

24 October 1998

Chong Siew Fai CJ (Sabah & Sarawak): I have read the judgment of my learned brother Mohamed Dzaiddin FCJ. With regret, I find myself unable

A to agree with him except on the issue of liability relating to the initial drawdown on the end-finance. In the circumstance, it is necessary that I set out the reasons for my decision.

Background facts

B The first appellant, Kluang Wood Products Sdn Bhd ('Kluang Wood'), was a licensed developer and the registered proprietor of all that parcel of land held under Johor Grant No 2365 for Lot No 506 in the District of Johor Bahru ('the land'). The second appellant, Chew Beng Gim (deceased and represented by his personal representative in this appeal), C was a director of Kluang Wood.

In 1983, Kluang Wood was desirous of developing the land into a housing project to be known as Taman Mewah comprising 498 units of different types of houses. The project was expected to be completed at the end of 1985. To that end, Chew Beng Gim ('Chew') managed to get introduced to one WP Pang ('Pang') who, at the material time, was the D southern regional manager of the first respondent, Hong Leong Finance Bhd ('Hong Leong'), with a view to negotiating the financing of the Taman Mewah project. They met in July/August 1983.

According to Chew (PW1), during the negotiation between him and Pang, the latter agreed that Hong Leong would furnish Kluang Wood E with a bridging loan and a syndicated end-finance with Hong Leong taking the lead. Pang had represented to him in the course of their negotiation that for a finance company of Hong Leong's repute, the amounts of the end-finance and the bridging loan would be 'peanuts'. Chew also said that the date of the drawdown of the end-finance was also discussed and the first drawdown thereof was expected to be in the first F quarter of 1984.

Following the negotiation, Hong Leong issued a letter of offer dated 26 October 1983 which was accepted by Kluang Wood on 28 October 1983. The material parts of the letter reads:

G Hong Leong Finance Bhd
(Ditubuhkan di Malaysia)

26 October 1983
M/s Kluang Wood Products Sdn Bhd
4th Floor, SPPL building
H 315, Alexandra Road,
Singapore 0315

Dear Sirs

Re: Bridging loan of RM3.5m and end-finance of RM26m

I We refer to your loan application and are pleased to confirm that our management committee has approved your bridging loan of RM3.5m and end-finance of RM26m subject to the following terms and conditions:

(1) For bridging loan

Loan amount: RM3.5m

Duration: 24 months from the date of first drawdown.

Security: The bridging loan shall be secured by:

(a) A first fixed charge under the National Land Code on the 32.325 acres of land to be developed and known as Johor Grant No 2365 Lot No 1466, District of Johor Bahru. When individual titles are available, the bridging loan shall be secured by first fixed charge over the 498 titles.

(b) Joint and several guarantee of all the following persons:

(i) Ong Tiong Soon

(ii) Chew Beng Gim

(iii) Leonard Cheng Tye Loke

(iv) Peter Gan Siew Chong

(v) Yap Teck Lock

(vi) Yap Teck Huat

(c) Full and unconditional guarantee of Feng Yuan Holding Pte Ltd.

Repayment: Payments of monthly interest on the amount drawdown shall begin one month after the loan amount is released in part or in full as to you or on your behalf.

(2) For end-finance

Manager: Hong Leong Finance Bhd will be the manager for the syndication of end-financing facilities of RM26m to Kluang Wood Products Sdn Bhd to finance the individual purchasers of Taman Putri. In addition, HLFB will also participate in the syndicated loan.

Amount of facility: Total end-financing facilities to be syndicated by HLFB is RM26m. HLFB will provide facilities of up to RM5m.

Purpose of facility: To finance the individual purchasers of the residential and shophouses in Taman Putri.

Interest rate:	For houses selling below RM100,000 — 10% pm on yearly rest basis. For houses selling about RM100,000 — 13.5% pm on yearly rest basis. For shophouse — 14% pm on yearly rest basis.
Duration:	For housing loan — maximum of 15 years. For mortgage loan — maximum of 10 years.
Participation fee:	A participation fee of 5% flat on the loan amount participated shall be payable to each lender in respect of its participation in the syndication.
Management fee:	0.5% of total loan amount syndicated (ie 0.5% of RM26m = RM130,000) payable to HFLB upon execution of master agreement.
Drawdown:	Loan to individual purchaser will be drawdown in proportion to the work-in-progress as certified by the project's architect. Before the drawdown of each loan, the developer has to confirm that the purchaser has paid the difference between the selling price and the loan amount. The final disbursement shall only be made upon issue of the certificate of fitness from the relevant authority.
Repayment:	The principal and interest repayment of each individual loan shall be by equal monthly instalments over the period of the loan commencing one month from the date of full disbursement of the loan.
Security:	(a) Loan agreement between purchaser and end-financier. (b) Assignment of the sale & purchase agreement between purchaser and developer to HFLB. (c) A first legal charge under the National Land Code over the respective lot upon issue of individual qualified title.
Special condition of approval:	HFLB reserves the right to alter the above stated terms and conditions as and when deemed necessary and to accept or reject each application for end-finance facility according to its merits and demerits.

Please note that the above offer will remain open for acceptance for one month ie until 26 November 1983. If we do not receive your signed copy of this letter accepting the offer, it will be deemed to have lapsed and new terms will have to be renegotiated.

tIf the above terms and conditions are acceptable to you, kindly confirm acceptance to our offer by signing and returning the duplicate copy of this letter.

Your faithfully

For Hong Leong Finance Bhd
Johor Bahru Branch

Signed:
Chuang Siow Hwee
Branch Manager

I/We confirm acceptance of the above

(Signed)

.....
For & on behalf of Kluang Wood Products Sdn Bhd
cc Credit Evaluation Dept

It was the case of Kluang Wood that by the above letter, Hong Leong had expressly or by necessary implication represented to Kluang Wood that:

(a) a bridging loan of RM3.5m had been approved; and

(b) that an end-finance facility of RM26m had been approved, which facility to be syndicated by Hong Leong would be managed by Hong Leong and made available for the benefit of the purchasers of the houses to be built under the project. Kluang Wood also pleaded that Hong Leong had further represented that the initial drawdown of the said end-finance facility would be in the first quarter of 1984.

It was undisputed that initially, Kluang Wood applied for a RM4.5m bridging loan and RM21m end-finance but was instead approved RM3.5m bridging loan and RM26m end-finance. As security for the bridging loan, Kluang Wood created a charge dated 29 October 1983 over the land in Hong Leong's favour. An added security was also furnished by Kluang Wood's directors, including Chew, by way of a joint and several guarantee dated 29 October 1983.

It was also not disputed that the end-finance of RM26m was not provided. For reasons which I do not consider it necessary to set out here, the efforts of Hong Leong to syndicate the end-finance fell through though for the RM5m being Hong Leong's share of the end-finance as stated in the letter dated 26 October 1983, Chew had executed a guarantee on 16 November 1984. As it turned out, however, no end-finance at all, including the RM5m supposed to come from Hong Leong, was made available to Kluang Wood though the bridging loan of RM3.5m had been fully utilized by Kluang Wood.

A On 8 May 1985, Hong Leong took out a writ (Civil Suit No 354 of 1985) in the Johor Bahru High Court against the guarantors including Chew for recovery of the bridging loan ('the Johor Bahru suit').

On 5 March 1986, Hong Leong obtained a summary judgment under O 14 of the Rules of the High Court 1980 against the guarantors, including
B Chew, for the sum of RM3,673,051.50.

On 16 May 1985, Hong Leong enforced the charge on the land against Kluang Wood by Originating Summons No 210/85 in Johor Bahru. Kluang Wood did not enter appearance nor resisted the action. An order for sale of the land was made by the High Court of Johor Bahru, and subsequently a date was fixed for sale of the land by way of public auction. The auction sale
C was aborted a few times and each time a new date was fixed with reduced reserve price (RM5m initially). The land was sold to the second respondent, Pelita Terang Sdn Bhd, a subsidiary of Hong Leong, for RM3.2m.

Against this background, Kluang Wood and Chew commenced the present action (subject matter of this appeal) against Hong Leong and Pelita
D Terang Sdn Bhd, the successful purchaser of the land.

The present action

Essentially, the claims of Kluang Wood and Chew were twofold:

Firstly, they claimed that Hong Leong's failure to provide the end-
E finance of RM26m as represented in its letter dated 26 October 1983 caused the failure of their Taman Mewah project and also disabled Kluang Wood from servicing the interest on the bridging loan. They further alleged that Hong Leong was negligent and acted in breach of its duty when it represented to Kluang Wood that the end-finance of RM26m would be made available to house buyers of Taman Mewah and that the first
F drawdown thereof would be in the first quarter of 1984. They also relied on the letter dated 26 October 1983 (materially reproduced above) to substantiate their case of Hong Leong's commitment to making the bridging loan of RM3.5m and an end-finance of RM26m available. Paragraph 7 of the re-re-amended statement of claim reads:

G > By a letter dated 26 October 1983, the first defendant [Hong Leong] expressly or by necessary implication represented to the first plaintiff [Kluang Wood] as follows:
>
> (a) that a bridging loan of RM3.5m in favour of the first plaintiff had been approved; and
>
H > (b) that a syndicated end-financing facility of RM26m to be managed by the first defendant will be made available for the benefit of the purchasers aforesaid.

In the alternative, Kluang Wood and Chew pleaded that the aforesaid representations of Hong Leong constituted a collateral warranty that Hong Leong would provide the end-finance of RM26m to Kluang Wood and that
I in breach of the said warranty, Hong Leong had caused them loss and damage estimated at RM13m.

The second claim of Kluang Wood and Chew related to the sale of the land to Pelita Terang Sdn Bhd by auction. They alleged that Hong Leong had acted in bad faith and/or fraudulently in the exercise of its power of sale in that, inter alia, it had at all times formed the intention to purchase the land by itself or through the agency of another and had, through its inside knowledge of the reserve price of the land, waited until the reserve price was RM3.2m before getting its subsidiary, Pelita Terang Sdn Bhd, to bid at the fifth and final public auction of the land. Kluang Wood and Chew contended that Pelita Terang Sdn Bhd aided and/or abetted in the commission of the fraudulent acts of its holding company, Hong Leong. In the alternative, Kluang Wood and Chew alleged that Hong Leong was under a legal duty to exercise reasonable care and skill when exercising its power of sale and at all material times had acted in breach of that duty, resulting in loss and damage to Kluang Wood and Chew. At the trial, the learned trial judge dismissed this claim. In the course of this appeal before us, Kluang Wood and Chew abandoned this part of their appeal. Hence, no more needs to be said about it except for costs which I propose to deal with later.

Defence of Hong Leong and Pelita

Hong Leong and Pelita Terang Sdn Bhd launched a three-pronged defence. Firstly, they contended that the failure of Kluang Wood's Taman Mewah project was due to the latter's own mismanagement and poor planning. Secondly, they denied that the letter dated 26 October 1983 had expressly or impliedly represented as alleged or that the representations, if existed, would constitute the collateral warranty and breach thereof as alleged. Thirdly, they pleaded that Kluang Wood and Chew were estopped from maintaining the claim on the grounds that the issues raised had already been litigated in the Johor Bahru suit, and that Chew being a director of Kluang Wood, Kluang Wood was well aware of all the facts at the material times.

The learned trial judge's judgment

In her judgment, the learned trial judge found Pang had the authority to approve loans on behalf of Hong Leong. She held that based on the totality of the oral and the documentary evidence, Hong Leong had represented to Kluang Wood that availability of the end-finance was certain, that the first drawdown thereof would be in the first quarter of 1984, and that Pang of Hong Leong had been negligent in making the representations. The learned trial judge also held that Pang's oral representations constituted a collateral warranty which was breached when no part of the end-finance came from Hong Leong.

However, despite the above findings, the learned trial judge held that Hong Leong's plea of res judicata succeeded in that the claims of Kluang Wood and Chew in this action on negligent misrepresentations and alternatively for breach of collateral warranty could not be litigated upon because there was privity of interest between Kluang Wood and Chew in the

Johor Bahru suit, Chew being a director and agent of Kluang Wood. She held that res judicata applied 'to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit' (ie the Johor Bahru suit). The learned trial judge accordingly dismissed the action by Kluang Wood and Chew with costs.

Bridging loan

Before dealing with this appeal, one point may conveniently be disposed of ie reasons for Kluang Wood's failure to service the bridging loan. Whilst Kluang Wood attributed the failure to the unavailability of the end-finance as allegedly promised by Hong Leong, Hong Leong contended that the failure was due to poor planning and mismanagement of the project by Kluang Wood. The learned trial judge upon a review of the relevant evidence rejected, in my opinlon justifiably, the contention of Hong Leong that poor planning and mismanagement was the cause. There is ample material justifying the conclusion of the learned trial judge in this regard. The evidence of Chew (PW1) showed that in the first quarter of 1984, Kluang Wood had secured 47 buyers and by December 1985, they had 116 purchasers, some of whom continued with their purchases of houses despite the unavailability of the end-finance from Hong Leong. Chew also testified that Kluang Wood completed works on 325 units in phase 1 of the project with an estimated work value of RM8m. For the purpose of this appeal, however, it is unnecessary to deal with the point as to whether the failure to service the bridging loan was due to the unavailability of the end-finance. Judgment had already been entered on the bridging loan in the Johor Bahru suit. Even the land charged as security for the bridging loan had been sold in the originating summons proceedings. Therefore, in the treatment of this appeal and the cross-appeal, I do not propose, unless required in the context, to dwell upon submissions of counsel in this respect.

Appeal and cross-appeal

Against the dismissal of the action, Kluang Wood and Chew appealed. Hong Leong and Pelita Terang also cross-appealed.

Before dealing with the appeal and the cross-appeal, I remind myself of the general principle that in so far as the conclusion of a trial judge is a finding of fact on the oral evidence set in the appearance, demeanours and credibility of the witnesses before him or her, the appellate court should normally defer to the opinion of the trial judge. Generally, such finding ought not be disturbed unless the appellate court is convinced that it is wrong. It would not be sufficient to warrant any interference merely because the appellate court entertains doubt whether such finding is right: *Antonio Dias Caldeira v Frederick Augustus Gray* [1936] MLJ 110.

In *Chow Yee Wah & Anor v Choo Ah Pat* [1978] 2 MLJ 41 at p 42, the Privy Council approved the following test in respect of appellate intervention expressed by Lord Shaw in *Clarke v Edinburgh Tramways Co* 1919 SC 35 at p 36:

> In courts of justice in the ordinary case, things are much more evenly divided; witnesses without any conscious bias towards a conclusion may have in their demeanour, in their manner, in their hesitation, in the nuance of their expressions, in even the turns of the eyelid, left an impression upon the man who saw and heard them which can never be reproduced in the printed page. What in such circumstances, thus psychologically put, is the duty of an appellate court? In my opinion, the duty of an appellate court in those circumstances is for each judge of it to put to himself, as I now do in this case, the question, am I — who sit here without those advantages, sometimes broad and sometimes subtle, which are the privilege of the judge who had heard and tried the case — in a position, not having those privileges, to come to a clear conclusion that the judge who had them was plainly wrong? If I cannot be satisfied in my own mind that the judge with those privileges was plainly wrong, then it appears to me to be my duty to defer to his judgment.

See also *Thomas v Thomas* [1947] AC 484 at pp 487–488 per Lord Thankerton and *Benmax v Austine Motor Co Ltd* [1955] 1 All ER 326 at p 329 per Lord Reid in respect of the proper function of an appellate court in dealing with findings of fact by a trial judge.

The cross-appeal of Hong Leong and Pelita Terang is against the findings of the learned trial judge that:

(1) Kluang Wood's inability to service the interest on the bridging loan was due to Hong Leong's failure to secure and provide the end-finance (I have earlier dealt with this herein);

(2) the agreement between Hong Leong and Kluang Wood contained in the letter dated 26 October 1983 placed upon Hong Leong an obligation to secure and provide end-finance to the extent of RM26m, RM5m or at all;

(3) Pang had represented the provision of end-finance and that it would be a certainty, considering that such representations were at variance with the agreement dated 26 October 1983; and

(4) the representations were negligently made and/or were capable in law of giving rise to a collateral warranty.

Another ground of the cross-appeal contended that the learned trial judge had erred in relying on oral representations in excess of what had been pleaded particularly that the pleadings limited oral representations to the issue of the date of initial drawdown of the alleged end-finance facility. Since no submission was advanced before us by counsel on this ground, I take it that it had been abandoned. However, I would venture to say that I do not think the pleading had expressly rested the issue of the initial drawdown on oral representation though as the evidence unfolded this happened to be the case. See para 7A of the re-re-amended statement of claim which does not expressly plead that the representation was oral. Kluang Wood had also pleaded representation, express or implied, about the approval and availability of the end-finance by virtue of the letter dated 26 October 1983. This representation, even by implication, is well grounded by the said letter. The impression about certainty of the end-

finance which was evidentially derived from the negotiation between Chew and Pang went to support the representation by the letter as pleaded. The learned trial judge came to the conclusion about certainty of the availability of the end-finance based on both oral and documentary evidence (see p 91 of the appeal record). In the circumstance, I do not think the conclusion can be said to have so drastically departed from the pleading as meriting it to be totally disregarded or set aside, though admittedly, the pleading could have been settled with better clarity.

The cross-appeal also contended that the learned trial judge had failed to consider adequately or at all:

(a) the lack of committed purchasers for the housing project;

(b) Kluang Wood's inability to prove saleability of the project;

(c) that the agreement contained in the letter dated 26 October 1983 between Kluang Wood and Hong Leong was conditional upon matters which were not fulfilled; and

(d) Kluang Wood's and Chew's mismanagement of the project (already dealt with herein earlier).

I would straightly deal with these complaints and hold that points (a), (b) and (d) are without merits. They had been adequately considered by the learned trial judge (see pp 66, 74 to 77 of the appeal record). The learned trial judge had in fact held that the allegations of poor management and poor planning on the part of Kluang Wood had not been made out. As regards point (c), it cannot be denied upon construction of the letter that the bridging loan and the end-finance were approved with terms and conditions to be complied. This clearly was in the mind of the learned trial judge (see p 64 of the appeal record). More will be said in this regard. But if, by point (c), it was intended to argue that the approval was subject to a certain condition or conditions precedent, I do not find the contention tenable.

It was also contended that the learned trial judge had erred in holding that the architect's obligation to provide architect's certificates was dependent on the availability of the end-finance. To fully appreciate the reasoning of the learned trial judge, it would be necessary to quote the whole paragraph of the judgment. This appears on p 80 of the appeal record which reads:

> My answer to this objection is that the obligation to provide the architect's certificates had not arisen at all as no end-finance had been provided. If the end-finance was available, I am sure that the first plaintiff would have procured the necessary architect's certificates and submitted them to the first defendant for the release of the money as is the accepted practice recognized in the building industry.

The holding of the learned trial judge relates to Hong Leong's complaint about the absence of architect's certificates showing the stages of works completed (see pp 79 and 80 of the appeal record). It is important to note that the contention related to the standardized sale and purchase

agreements between the various purchasers and Kluang Wood (more particularly cl 4(2) thereof) as opposed to Hong Leong's letter of approval dated 26 October 1983. Clause 4(1) stipulated instalment payments of the purchase price in accordance with the Third Schedule, none of which, unfortunately, were included in the appeal record. All the sale and purchase agreements were concluded on different dates from the later part of February 1984 till as late as December 1985 (see pp 722–1054 of the appeal record). This is a case where the provision of the end-finance had totally failed. In the light of the circumstances, I do not think it can be said that the learned trial judge had erred in holding as stated above.

The appeal and the cross-appeal ie those grounds not yet disposed of earlier herein may conveniently be dealt with under three heads:

(1) the existence or otherwise of Hong Leong's contractual obligation to provide the end-finance;

(2) were there negligent misrepresentations, collateral warranties, and breach thereof by Hong Leong?; and

(3) availability of res judicata or issue estoppel as a defence.

(1) Contractual obligation

Mr Manjit Singh submitted before us that Hong Leong's letter of offer dated 26 October 1983 and Kluang Wood's acceptance thereof constituted, inter alia, a distinct contractual obligation on the part of Hong Leong to provide a syndicated end-finance of RM26m of which Hong Leong would take participation of RM5m. In support thereof, he alluded to the guarantee executed by the directors of Kluang Wood (including Chew) for Hong Leong's own contribution of RM5m towards the end-finance. Mr Cecil Abraham for Hong Leong, on the other hand, contended that Hong Leong's obligation was only to provide the bridging loan and that as for the end-finance, there were terms and conditions with which Kluang Wood must first comply before Hong Leong's obligation to provide it arose, one of which was said to be that Kluang Wood must produce the architect's certificate showing the work progress before the end-finance would be released and that since none was shown, Hong Leong's obligation for a drawdown did not arise.

Upon review of the totality of the oral and the documentary evidence adduced, the learned trial judge found that Hong Leong had represented to Kluang Wood that availability of the end-finance was a certainty and that the first drawdown would be in the first quarter of 1984 (I shall deal with this latter finding later). And based on the agreement contained in Hong Leong's letter dated 26 October 1983 and the guarantee dated 16 November 1984 in favour of Hong Leong in respect of the RM5m being part of the end-finance, the learned-trial judge held that Hong Leong Finance was contractually bound to provide its contribution of the end-finance but had failed to do so.

Hong Leong's contractual obligations could properly be ascertained from its letter of offer dated 26 October 1983 which Kluang Wood had

A accepted. The letter as accepted by Kluang Wood clearly showed Hong Leong's commitment to the end-finance of RM26m to be syndicated by Hong Leong and in which Hong Leong would participate RM5m. Indeed, the terms and conditions relating to the end-finance and contained in the said letter are clear leaving no room for surmise on Hong Leong's obligation to make available the end-finance to Kluang Wood through syndication and
B Hong Leong's participation of RM5m. The letter clearly stated that Hong Leong had 'approved' the end-finance of RM26m. There is nothing in the letter indicating the approval being subject to any condition precedent or to Hong Leong being able to get the syndicated loan or the like. In the circumstance, all such terms and conditions in the letter relating to the
C management of the end-finance by Hong Leong, the total amount of the end-finance to be syndicated and Hong Leong's participation therein, reinforce the stipulation that the end-finance would be furnished.

(2) Any negligent misrepresentations, collateral warranty and breach thereof

D

To recapitulate, it was not disputed that there had been negotiations for end-financing between Chew and Pang in July/August 1983. The impugned representations contended to have been made by Pang to Chew were, in essence, that for a financial institution like Hong Leong to procure a syndicated end-finance of RM21m (the amount mentioned during the
E discussion, as the evidence shows) would present no problem and that the first drawdown of the end-finance would be in the first quarter of 1984. It is in the evidence of Chew that Pang had told him that the total amount including the bridging loan and the end-finance was peanuts for Hong Leong and would pose no problem, that the assurance as to the availability of the syndicated loan by Pang was not, in any way, qualified and that,
F relying on the aforesaid representations, Kluang Wood applied for and obtained approval of the facilities including the availability of the syndicated end-finance of RM26m of which Hong Leong itself would contribute RM5m.

Chew was not challenged about Pang making the representations nor
G was there any cross-examination thereon. Pang did not give evidence. Regarding the whereabouts of Pang, the learned trial judge was critical of the lack of evidence as to when it became apparent that Pang could not be traced and also of the lack of evidence on the efforts made to trace him.

On the evidence as adduced, the learned trial judge, in my opinion, was
H justified in concluding that Pang had made the representations and that they were 'unrebutted and unchallenged'.

As regards Pang's representation that the first drawdown of the end-finance would be in the first quarter of 1984, I agree with my learned brother Mohamed Dzaiddin FCJ that no liability could be attached to Hong Leong. The essence here is the timing ie the first quarter of 1984. Under the
I heading 'drawdown' contained in the subsequent letter of Hong Leong dated 26 October 1983 and accepted by Kluang Wood, it was stipulated, inter alia, that the end-finance would be 'drawdown in proportion to the

work-in-progress as certified by the project's architect.' According to Chew's evidence, the drawdown for the first quarter would be in the region of RM1,072,200. Hong Leong's own share in the end-finance was RM5m. But there is no evidence showing that the architect's certificate required under the said letter had been issued. On the evidence, the benefit of doubt ought, in my opinion, to be given to Hong Leong in that the first drawdown might have been furnished had the requisite certificate been issued. Therefore, it is my view that in so far as there had been no first drawdown of the end-finance in the first quarter of 1984 as represented, no blame ought to be attributed to Hong Leong.

It may be convenient to state here, however, that the above reasoning does not hold good for Hong Leong's total failure of making available the end-finance after the first quarter of 1984. In this regard, different considerations apply. Here, the oral representation substantiated by the letter dated 26 October 1983 related to the certainty of availability of the end-finance without reference to any specific time. It is not disputed that no end-finance at all was available to Kluang Wood and there is evidence that the syndication fell through. This became obvious after the first quarter of 1984. Therefore, there had been a fundamental breach by Hong Leong that went to the root of the contract. It is in the evidence of Chew that the end-finance was, at least, partially needed to finance the construction of the project. I use the words 'at least, partially,' because there is also evidence that the end-finance was needed for service of the interest on the bridging loan. In dealing with the contentions of parties in respect of the reasons for the failure of the Taman Mewah project (ie owing to the failure to provide the end-finance as promised as contended by Kluang Wood or because of poor planning and mismanagement of the project as advanced by Hong Leong), the learned trial judge found, which I see no reason to disagree, that failure of the project was not due to any poor planning and mismanagement thereof. In the circumstance, it is not open to Hong Leong to use the lack of architect's certificates as an excuse to shred liability for its own fundamental failure.

As regards the criticism that the representation rested on the impression derived by Chew from the negotiation with Pang rather than on Pang's actual utterances, I fail to see why an impression, if properly formed from negotiation with someone, cannot form the basis of a representation (see eg *Box v Midland Bank Ltd* [1979] 2 Lloyd's Rep 391 (discussed later)). If there is any doubt, it is for the opposing party to test the propriety or correctness of the alleged impression. In the instant case, Chew was not at all cross-examined in this regard. On the other hand, the subsequent letter dated 26 October 1983, approving, inter alia, the end-finance, contrary to being 'at variance' as alleged, in fact materially substantiated Chew's impression in respect of certainty of the financial arrangement. I see no merit in the complaint.

One point though ought, in my opinion, be clarified. In her judgment, the learned trial judge said to the effect that Pang had represented, inter alia,

'that the availability of end-finance was a certainty'. If, by this, it were taken to mean that Pang had actually uttered the word 'certainty', then, with respect, a perusal of the notes of evidence does not show that Chew had used the word 'certainty' in his testimony. However, this, in my opinion, does not render the conclusion of the learned trial judge untenable. On the evidence relating to the representations made by Pang to Chew, it is not an unfair or unreasonable conclusion that what Pang had represented to Chew gave the latter the impression of certainty of the availability of the end-finance.

For Hong Leong, it was contended that the learned trial judge did not find that Pang had been negligent in making the representations. Whilst it is true that the learned trial judge did not expressly hold that the representations were negligently made, it is obvious from the facts and the circumstances and from the manner in which she treated them that she was fully aware that a case of making statements negligently had to be made out. In point of law, proof of negligence involves proof of some duty owed by the defendant to the plaintiff, some breach of that duty and damage to the plaintiff which is causally connected with the breach of duty to take care.

In relation to statements made in pre-contractual negotiations, if a contracting party is under a duty of care in making such statements, a breach of that duty may lead to liability in tort for negligence. Thus, in *Esso Petroleum Co Ltd v Mardon* [1976] 2 All ER 5 where the plaintiffs' servant holding himself out as having special expertise made a negligent representation in circumstances which gave rise to the duty to take reasonable care to see that the representation was correct, and the duty of care existed during the pre-contractual negotiations and survived the making of the written contract, the plaintiffs were held liable in the tort of negligence. In our present case, the learned trial judge, finding that Hong Leong, through Pang, had represented to Kluang Wood that the availability of the end-finance was a certainty and that the first drawdown would be in the first quarter of 1984, and noting that no end-finance at all was provided, posed the question whether Pang had been negligent in making the representations, and alluded to the three elements necessary to establish the existence of a duty of care as propounded in *Charlesworth & Percy on Negligence* (8th Ed) at p 83 which read:

> The elements, which normally are essentials, in order to establish the existence of such a duty (ie duty of care) are:
>
> (a) it [the advice or information given] must concern a business or professional transaction, the nature of which makes clear the 'gravity of the inquiry and the importance and influence attached to the answer';
>
> (b) the informant either realizes or ought to have realized that he was being trusted as a matter of importance to give advice or express an opinion or disclose the best information known to him, since his statement was likely to be the basis upon which the recipient intended to act; and
>
> (c) in all the circumstances it was reasonable for the recipient to act on such advice, opinion or information.

The learned trial judge then found:

(1) that the statements made concerned a business transaction;

(2) that Pang as the chief manager of Hong Leong southern region, realized that he was being entrusted to give all necessary information on which Kluang Wood could act; and

(3) that, in the circumstances of this case, it was 'not unreasonable' that Chew had acted on the statements resulting, as events turned out, to the detriment of Kluang Wood (see pp 92 and 93 of the appeal record).

From the above, it is implicitly clear that the learned trial judge found Pang negligent in making the statements.

An action for damages lies in respect of a misstatement which was negligently made, thereby causing pecuniary loss to a person relying on such statement unless responsibility is expressly disclaimed in making the statement: *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465. In that case, Lord Morris of Borth-y-Gest after considering the extent of liability that the making of negligent misstatement attached to such professionals as an accountant, a solicitor or a doctor, continued (at p 495):

> I can see no difference of principle in the case of a banker. If someone who was not a customer of a bank made a formal approach to the bank with a definite request that the bank would give him deliberate advice as to certain financial matters of a nature with which the bank ordinarily dealt the bank would be under no obligation to accede to the request: if, however, they undertook, though gratuitously, to give deliberate advice (I exclude what I might call casual and perfunctory conversations) they would be under a duty to exercise reasonable care in giving it. They would be liable if they were negligent although, there being no consideration, no enforceable contractual relationship was created.

Box v Midland Bank Ltd [1979] 2 Lloyd's Rep 391 which applied the *Hedley Byrne* principle (as the ratio in *Hedley Byrne v Heller* is commonly known) contains certain salient features that bore comparable similarity to those in the instant appeal before us. There, the plaintiff, Mr Box, a consultant engineer, asked the defendant bank to provide finance for a project of his company. The manager of the bank gave Mr Box the impression that he (the manager) agreed, provided Mr Box took out a policy issued by the export credit guarantee department ('ECGD'), in which case the consent of the bank's head office to provide the finance would be a mere formality. The bank manager, however, failed to explain the difference between an ECGD policy and an ECGD banker's guarantee (bills and notes) issued by the same department but gave the impression that both were equally easy to obtain. Mr Box applied for the latter which he failed to get. Meanwhile, the head office of the bank informed the bank manager that there was not the slightest possibility of the amount of the loan being sanctioned. The company ran into financial difficulty. Mr Box brought an action against the bank for damages in negligence on the grounds that he had suffered loss by

A relying on the careless statements made by the bank manager about the availability of finance. It was held that although the bank manager was not obliged to predict the outcome of an application for a loan, if he did so, he was under a duty to take reasonable care since he knew that his prediction would be relied upon. He had failed to exercise the reasonable care to be expected of a competent bank manager as he had given Mr Box the B impression that the granting of a loan would be a mere formality once the policy had been obtained. Applying the *Hedley Byrne* principle, the bank was therefore held liable. In his judgment, Lloyd J remarked (at p 398):

> The *Hedley Byrne* principle is not limited to negligent advice. It covers negligent statements generally including pre-contractual statements of the C kind which grounded liability in *Esso Petroleum Co Ltd v Mardon* [1967] QB 801.

The *Hedley Byrne* principle was applied in our courts in *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126 and *Chin Sin Motor Works Sdn Bhd & Anor v Arosa Development Sdn Bhd & Anor* [1992] 1 MLJ 23. In the latter D case, the appeal to the Supreme Court was, as far as my research went, withdrawn.

On the facts and circumstances of the present case under appeal and applying the principles of law propounded in the authorities cited above, it is obvious to me that Pang had been negligent in making the statements upon which Kluang Wood had acted in making the loan application and to E its detriment.

Next, the complaint was about the collateral warranties. In view of what I have said about the first drawdown of the end-finance, the collateral warranty now relates only to the statement by Pang to the effect that the availability of the end-finance was a certainty. For Hong Leong, it was F contended that Hong Leong could not possibly have given RM26m end-financing because of the maximum amount imposed by Bank Negara and that to lend in excess of the maximum, approval of Bank Negara had to be sought. Reference was made to the evidence of DW1, Chuang Siow Hwee.

In reply, Mr Manjit Singh for Kluang Wood submitted that the end-G finance was not to be given to a single customer but to the purchasers, ie house buyers, so that the question of breaching the Bank Negara ruling did not arise.

With respect, I do not think the contention on behalf of Hong Leong is tenable. The pertinent question is whether Pang had represented to Chew to the effect that availability of the fund was a certainty. If he had, as found H by the learned trial judge, it mattered not whether approval was needed and not obtained since this was not made known to Chew during the negotiation. It was also not mentioned in the agreement letter dated 26 October 1983 which stated that the end-finance would be syndicated. If sanction of the Bank Negara was indeed necessary, Hong Leong should have made it known to Kluang Wood at some material stage or conditioned I its approval of the syndicated end-finance upon obtaining the approval of the Bank Negara.

On behalf of Hong Leong, admissibility in evidence of the collateral warranties based on Pang's pre-contractual statements aforesaid was called in question by reference to s 92 of the Evidence Act 1950, the main provision of which reads:

> When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying adding to, or subtracting from its terms.

With respect, the contention, in my opinion, is unsustainable. Proviso (b) to s 92 reads:

> the existence of any matter on which a document is silent and which is not inconsistent with its terms, may be proved, and in considering whether or not this proviso applies, the court shall have regard to the degree of formality of the document; ... .

Thus, if the additional evidence sought to be introduced falls within the scope of the proviso, it may be admitted in evidence. In considering whether the proviso applies, regard is to be had to the nature of the written agreement and, in my opinion, also its surrounding circumstances. The document in the instant case is in the form of a letter. The matters about certainty of the end-finance and Pang's utterances giving rise to the impression of such certainty are not in the document, nor is certainty of the finance inconsistent with the terms therein. As regards the utterance about the timing of the first drawdown, I also do not think it inadmissible. The proviso applies. No time-frame about the first drawdown was given in the said letter. In *Tan Chong & Sons Motor Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220, provisos (b) and (c) of s 92 of the Evidence Act 1950 were considered and oral pre-contract representations were held admissible (see also *Tan Chong & Sons Motor Co Ltd v Yang Chin Lang* [1967] 1 MLJ 123). English authorities also show that where on a sale or letting of houses, the written contract did not contain an oral warranty previously given by the vendor builder or the landlady's agent, the parol evidence was admitted (see *Otto v Bolton* [1936] 2 KB 46 at pp 50–51; *Miller v Cannon Hill Estates Ltd* [1931] 2 KB 113 at p 118 and *Collins v Hopkins* [1923] 2 KB 617 at p 629). The learned trial judge, therefore, was justified in admitting them in evidence.

As to the consequence of breach of the collateral warranty by Hong Leong, the learned trial judge was obviously of the view, which I have no reason to disagree with, that the failure of the Taman Mewah project was due to unavailability of the end-finance.

(3) Res judicata

As stated earlier, the learned trial judge dismissed the claims of both plaintiffs, holding that res judicata applied in that there was privity of

A interest between Kluang Wood and Chew. After alluding to the fact that Chew was a director of Kluang Wood and was 'involved in the conduct of the affairs of' Kluang Wood as agent for Kluang Wood, the learned trial judge continued:

> The first plaintiff (ie Kluang Wood) must be presumed to be privy to all
> B matters conducted by PW1 (ie Chew) on behalf of the first plaintiff including all matters giving rise to the cause of action in the earlier civil suit (ie Johor Bahru suit). As the second plaintiff (Chew) was sued as a guarantor in the earlier suit in respect of the bridging loan that had been granted by the first defendant (Hong Leong) to the first plaintiff, there is therefore ample evidence to show that there is a privity of interest between the first plaintiff in
> C these proceedings before me and the second plaintiff in the earlier civil suit and to that end, res judicata is applicable to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit (pp 107 and 108 of the appeal record).

Counsel for Kluang Wood and Chew submitted that no privity of interest
D existed, there being no common interest between the two. He pointed out that the Johor Bahru suit was on a guarantee executed by Chew. Kluang Wood was not a party to and had no interest in that suit. Kluang Wood, on the other hand, had independent causes of action against Hong Leong.

For Hong Leong, counsel submitted that there was privity of interest
E between Kluang Wood and Chew. In support, reference was made to the evidence of Chew in this action and his affidavit evidence in the Johor Bahru suit. Counsel pointed out that in Hong Leong's application for summary judgment in the Johor Bahru suit, the defendant guarantors, including Chew, relied on the non-release of the end-finance as a defence to the said application.

F It may now be convenient to consider what Hong Leong had pleaded in its amended defence on issue estoppel in this action and what Chew had raised in the Johor Bahru suit.

Paragraphs 24 to 27 of the amended defence read:

G 24 The defendants will aver that the issues raised by the plaintiffs in paras 6 to 14 of the re-amended statement of claim fled in this suit have already been litigated by the first plaintiff in this suit (Kluang Wood) in Johor Bahru High Court Civil Suit No 354 of 1985 ('the Johor suit'). The Johor suit was commenced by the first defendant (Hong Leong) against, inter alia, the second plaintiff in this suit (Chew) in respect of a letter of
H guarantee dated 29 October 1983 executed by, inter alia, the second plaintiff in this suit (Chew) to secure the loan of RM3,500,000 made by the first defendant (Hong Leong) to the plaintiffs. The High Court at Johor Bahru entered judgment against the defendants in the Johor suit (Chew and other guarantors) on 5 March 1986 after hearing arguments from counsel for, inter alia, the second plaintiff, one Lim Chuen Ren.

I 25 The second plaintiff (Chew) had in the Johor suit filed an amended defence and affidavits setting out essentially the same defence as all allegations raised by the plaintiffs (Kluang Wood and Chew) in paras 6

to 14 of this suit. These allegations are dealt with the first defendant (Hong Leong) in its affidavit-in-reply in the Johor suit. The first defendant will refer to the said affidavits, amended defence and affidavit-in-reply at the trial of this action for their full terms and effect.

26 The defendants will also aver that the plaintiffs in this suit have stated in para 1 of the statement of claim in this suit that the second plaintiff (Chew) was at all material times a director of the first plaintiff (Kluang Wood). The first plaintiff was in the circumstances well aware of all the facts at material times.

27 By reason of the premises, the plaintiffs are estopped from maintaining their claim against the first defendant (Hong Leong).

In para 7 of their reply, Kluang Wood and Chew denied the allegations:

> In reply to paras 24, 25, 26 and 27 of the amended defence, the plaintiffs deny that they are in law or in fact estopped from prosecuting these proceedings or raising any of the issues therein.

By paras 24 to 27 of the amended defence, Hong Leong alleged in effect that the questions of negligent misrepresentation and breach of collateral warranty had already been litigated in the Johor Bahru suit and therefore, Kluang Wood and Chew were estopped from raising them in this action. The two questions constitute the two causes of action in this suit. Hence, such a plea is in fact a plea of res judicata by way of estoppel to the above two entire causes of actions (as opposed to a point in issue). It amounts to an allegation that the whole legal rights and obligations of Kluang Wood and Chew had been concluded by an earlier judgment in the Johor Bahru suit. In the face of such allegations by Hong Leong, the learned trial judge and this court would be entitled to look at the reasons for the decision and the notes of evidence of the trial judge in the Johor Bahru suit to determine whether the two questions constituting the causes of actions herein had been determined (see *Randolph v Tuck* [1961] 1 All ER 814). Unfortunately, the grounds or reasons for the decision in the Johor Bahru suit are not exhibited in this case. Hence, it has not been established that the two questions or causes of action had been adjudicated upon, the burden of which lies on the party who alleges it, ie Hong Leong in this case.

As regards the affidavit evidence in opposition to Hong Leong's O 14 application for summary judgment in the Johor Bahru suit in which Hong Leong sued Chew as guarantor of the bridging loan, paras 8 to 13 of the affidavit of one Yap Teck Lock, a co-defendant, made on behalf of all the defendants including Chew, read:

8 The purchasers have applied for and the majority of the purchasers have been granted loans. The loan documentation has also been done. However, the plaintiff (Hong Leong) has failed and still fails to release the end-financing.

9 I aver that if the end-financing is released, it would be sufficient to pay the amount due to the plaintiffs.

10 I aver and contend that if the end-financing is released, the sum so released will be paid directly to the plaintiff. Yet, the plaintiff refused to release the end-financing to pay off itself.

> 11 I aver that the plaintiff is estopped from claiming the sum allegedly owed by the developers from the defendants (Chew and other guarantors). I further aver and contend that it is inequitable for the plaintiff to claim against the defendants.
>
> 12 The defendants aver that prior to the signing to the alleged letter of guarantee dated 23 December 1983, the plaintiff and/or its agents or servants agreed that the plaintiff will release the loan granted to the individual purchasers and utilize the same to pay off the amount allegedly owed by the developers.
>
> 13 In reliance and in pursuance to the plaintiff's and/or its agents' or servants' agreement and misrepresentation, the defendants were induced to sign the letter of guarantee.

By paras 8 to 11 of the above affidavit, Chew was virtually contending that Hong Leong was estopped or it was inequitable for Hong Leong to claim the guaranteed sum by reason of its failure to release to the purchasers the end-finance which would have been paid directly to Hong Leong. Thus, the failure to release the end-finance on the part of Hong Leong, which was common ground in the present action, was merely used by Chew as a ground to found estoppel against the claim for the guaranteed sum. By paras 12 and 13 of the said affidavit, Chew alleged that he was induced to sign the guarantee by Hong Leong's agreement and misrepresentation that the end-finance to be granted to individual purchasers would be used to pay off the amount allegedly owed by Kluang Wood. It will be seen at once from the above paragraphs of the affidavit that the issues of collateral warranty and breach thereof and negligent misrepresentation by Pang on behalf of Hong Leong (which constitute the causes of action in the instant case under appeal) were not ever raised in the Johor Bahru suit, let alone having been adjudicated upon as averred in para 24 of the amended defence. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853, Lord Reid said (at p 913):

> The second requirement for res judicata is identity of subject matter. As to this it has become common to distinguish between cause of action and issue estoppel. There is certainly no cause of action estoppel here. The question before the German court was whether the Council for Gera were the legal representatives of the Stiftung at one date. The question here is whether at a different date the solicitors had the authority of the Stiftung to raise the action. An answer, yes or no, to the first question does not necessarily imply a similar answer to the second.

On the same reasoning, there is, in my view, no identity of subject matter and no cause of action estoppel in our present case. As stated earlier, it is common ground that the end-finance was never at all furnished by Hong Leong. The questions in the Johor Baru suit were whether the failure to provide the end-finance estopped Hong Leong from claiming the guaranteed sum from Chew, and whether there had been misrepresentation on the part of Hong Leong and/or its agents or servants inducing Chew to sign the guarantee dated 23 December 1983. In other words, the issues were whether there was estoppel and whether the signing was induced by the alleged misrepresentation, if any. The questions in our present case are

whether at an earlier date there had been negligent misrepresentations and whether the representations constituted a collateral warranty and breach thereof. The timing and facts forming the background of the questions raised in the two suits are different. The questions in our present case relate to matters that took place prior to matters relating to the issues raised in the Johor Bahru suit. Furthermore, answers, whether affirmative or negative, to the issues in the Johor Bahru suit do not necessarily mean similar answers to the causes of action in the present case. As for the matters raised in the affidavit, since the reasons for the decision on the summary judgment are not available, it would not be possible to say with any degree of certainty what had actually been decided in granting the judgment, but from the fact that the summary judgment was entered against Chew, it is reasonably safe to conclude that his contentions of estoppel and inducement did not constitute any triable issue in respect of the claim under the guarantee.

As for Kluang Wood, obviously it could not have raised the issues constituting the causes of action in the instant case in the Johor Bahru suit, it being not a party to that action which was an action on guarantee.

Another point of contention on res judicata is whether Kluang Wood and Chew were estopped from raising the second claim of fraudulent or improper exercise of power of auction sale on the ground that such claim could have been raised as a counterclaim in the charge action (Originating Summons No 210/85 in Johor Bahru) commenced by Hong Leong against Kluang Wood. In this regard, the learned trial judge, relying on *Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119, concluded (p 106 of the appeal record):

> Thus, based on the authority of *Kandiah Peter v Public Bank Bhd*, the defendants cannot rely on the plea of res judicata or issue estoppel either in its narrow or broader application as the answer to the plaintiffs' second claim in the proceedings before me. In any event, I have already decided that plaintiffs' second claim has not been substantiated.

The contention, in my view, is without merit. In any event, it need not be dealt with. Firstly, the auction sale under which the fraudulent or improper exercise of the power of sale were alleged to have arisen took place after the making of the sale order. Therefore, the allegations could not possibly be raised in the charge action. Secondly, the learned trial judge had held that the allegations constituting the second claim failed; and before us, the appeal relating to this second claim had been abandoned. The contention, therefore, has no merit and must fail.

Then there is the issue of whether Kluang Wood was a privy to Chew so as to be estopped from suing in this action? The relevant privity here is, of course, privity of interest (as opposed to privity of blood or title). In *House of Spring Gardens Ltd v Waite & Ors* [1991] 1 QB 241, Stuart-Smith LJ observed (at p 252):

> It is not easy to detect from the authorities what amounts to a sufficient interest.

A In that case, the plaintiffs obtained a monetary judgment in the Republic of Ireland against three defendants. Two of the defendants then brought another separate action in Ireland to set the judgment aside on the ground of fraud but their action was dismissed. In subsequent enforcement proceedings in England, the court gave judgment in favour of the plaintiffs. On appeal by the third defendant who was not a party to the second action B in Ireland, it was held that the second Irish judgment was final and conclusive on the issue as to whether or not the first judgment was obtained by fraud and therefore could not be impeached. The third defendant was thereby estopped from alleging that the first judgment had been obtained by fraud because he was privy to the parties who were bound by the estoppel, C having had knowledge of the second action which he had not chosen to join. In that case, the third defendant was a party to the first action.

Gleeson v J Wippell & Co Ltd [1977] 3 All ER 54 was a case on striking out an action under O 18 r 19 of the Rules of the Supreme Court. Nevertheless, it involved the questions of issue estoppel and the existence of privity of interest between present and former defendants. In that case, the D plaintiff, a shirt designer, unsuccessfully brought an earlier action against some shirt manufacturers for breach of copyright, the allegation being that the shirt manufacturers had copied a shirt supplied to them by the defendants in the present action which had itself been copied from shirts which were copies of the plaintiff's drawing. Having lost in that earlier suit, E the plaintiff commenced the instant action against the defendants who were also shirt manufacturers, alleging infringement of copyright in relation to the same shirt. The defendants sought to strike out the plaintiff's action on the ground that as the central issue raised in the statement of claim ie whether the defendants' shirts were indirect reproductions of the plaintiff's drawing had already been determined in the previous action, it was F frivolous, vexatious and otherwise an abuse of the process of the court for the plaintiff to relitigate what had already been decided against her. It was held that the defendants could not invoke the doctrine of issue estoppel against the plaintiff. The defendant had not been a party to the previous action and there was no ground for holding that they were in privity of interest with the defendants in that action or that they were linked in such G a way as to make any doctrine of res judicata applicable. There was a trade relationship between them but that was all. The court refused to strike out the action. Megarry VC in his judgment said (at p 60):

> ... but it does seem to me that, having due regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to H make it just to hold that the decision to which one was party should be binding in proceedings to which the other is party. It is in that sense that I would regard the phrase 'privity of interest'.

He later continued:

> Suppose that in the Denne action (the earlier action), the plaintiff, I Ms Gleeson, had succeeded instead of failing. Would the decision in that action that Wippell (the defendant in the instant action) had indirectly copied

> the Gleeson drawings be binding on Wippell, so that, if sued by the plaintiff, Wippell would be estopped by the Denne decision from denying liability? Counsel for Wippell felt constrained to answer yes to that question. In such a case, Wippell would be unable to deny liability to Ms Gleeson by reason of a decision reached in a case to which Wippell was not a party, and in which Wippell had no voice. Such a result would clearly be most unjust. Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest of suspicions. A defendant ought to be able to put his own defence in his own way, and to call his own evidence. He ought not to be concluded by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him. Even if one leaves on one side collusive proceedings and friendly defendants, it would be wrong to enable a plaintiff to select the frailest of a number of possible defendants, and then to use the victory against him not merely in terrorem of other and more stalwart possible defendants, but as a decisive weapon against them.

It appears the authorities tend to indicate that whether there is sufficient connection to constitute privity of interest would depend on an examination of the factual identity of interests of the parties and the fairness of binding them by a decision in which they were not represented.

Therefore, so far as concerning Kluang Wood, for the reasons given above, including that it was not a party to the Johor Bahru suit, there is, in my opinion, no valid ground for holding that Kluang Wood was in privity of interest with Chew in the Johor Bahru suit or that they were so linked as to make the doctrine of res judicata applicable. Furthermore, the grounds for the decision in the Johor Bahru suit were not available in evidence in the present suit and accordingly unknown.

For all the above reasons, I am of the view that Kluang Wood is entitled to succeed in this action against Hong Leong.

Could Chew sue?

In the case of Chew, the situation falls into a totally different category. It relates to his capacity to sue on the two causes of action in the present suit. In her judgment, the learned trial judge said that Chew should have brought up the two causes of action in the Johor Bahru suit. Could he? As a matter of law, an agent who has contracted for a disclosed and named principal cannot, as a rule, sue on the contract: *Fairlie v Fenton* (1870) LR 5 Exch 169; *Evans v Hooper* [1875] 1 QBD 45; *TP Jordeson & Co and Kahn v London Hardwood Co Ltd* (1913) 110 LT 666. This is so even if he is the real principal, unless the other party has affirmed the contract with knowledge of the fact: *Bickerton v Burrell* (1816) 5 M & S 383; *Rayner v Grote* (1846) 15 M & W 359. There are, of course, certain other exceptions but they are not applicable in our present case. In the instant case, it cannot be disputed that Chew, to the knowledge of Hong Leong, negotiated for Kluang Wood throughout. The right of action to which the collateral warranty gives rise is

personal as between the two contracting parties concerned. As between them, breach of the warranty may form the basis of an action for damages, but it does not normally entitle a non-contracting party to sue thereon. Therefore Chew, in my opinion, cannot sue on the two causes of action.

Furthermore, assuming Chew had the right to sue thereon, his evidence departed from his pleading. Paragraph 23 of the re-re-amended statement of claim reads:

> The second plaintiff [Chew] contends and will contend that but for the breach of the aforesaid duties owed by the first defendant [Hong Leong] to him, his liability under the said guarantee and the judgment would have been extinguished by the proceeds obtained from the lawful sale of the said land.

It is clear from the re-re-amended statement of claim that the phrase 'the said guarantee' in para 23 above referred to the guarantee executed by Chew in respect of the bridging loan of RM3.5m, and that 'the judgment' related to the summary judgment obtained in the Johor Bahru suit for the sum guaranteed. It is also obvious that the 'aforesaid duties' owed by Hong Leong said to have been breached were the alleged 'duty to act in good faith and honestly' and 'to exercise reasonable care and skill in relation to the power of sale of the land. As stated earlier, this part of the case about fraudulent sale had been abandoned by Kluang Wood and Chew in this appeal. Be that as it may, from the point of view of the pleading, by the said para 23, Chew pleaded, in effect, that had it not been for the breach of the duties to conduct the auction sale of the charged land by Hong Leong, his liability under the guarantee would have been settled from the sale proceeds. However, Chew's evidence, contrary to what he had pleaded, seems, though somewhat vaguely, to attribute the enforcement of the guarantee for the bridging loan against him to the failure of Hong Leong to furnish the end-finance as opposed to the alleged breach of duties relating to the auction sale as pleaded. This was what he said in his evidence:

> If the end-financing had come and the first plaintiff had completed the project, the profits as projected by the first defendant was RM12,592,400 ... . There is a debt owing by me to the first defendant amounting to RM3.7m with interests. I ask this court for damages and for damages I have to pay back the first defendant amounting to RM3.7m. (Pages 136 and 137 of the appeal record.)
>
> One of the purposes of the end-financing was to repay the interest due on the bridging loan. ... The end financing will assist to pay interests on the bridging loan and later on to redeem individual lots and also finance construction of the development. (Page 147 of the appeal record.)
>
> In August 1983, when I negotiated with the first defendant, it was contemplated that the end-financing would be utilized to pay the interests due on the bridging loan. (Page 151 of the appeal record.)

However he had also said:

> In CS 354/85, I am represented by lawyers but I do not know the defences they had put up for me. (Page 144 of the appeal record.)

In any event, the fact that summary judgment for the bridging loan was entered against Chew in the Johor Bahru suit reasonably clearly indicated the rejection of Chew's attempt to raise some triable issues. And there was no appeal against that decision.

There remains claim (d) in the re-re-amended statement of claim where Chew sought for a declaration that Hong Leong was not entitled to execute upon the judgment obtained by Hong Leong against Chew in the Johor Bahru suit. On the facts and the circumstances in this case under appeal including that the claim on impropriety of the auction sale having been abandoned, and what I have said immediately above in relation to para 23 of the re-re-amended statement of claim, I find no merit in the claim, which is hereby dismissed.

For the above reasons, the claim of Chew in this action must, in my opinion, fail.

Conclusions

In short, my conclusions are:

> The learned trial judge was justified in holding that there had been negligent misrepresentation about certainty of the end-finance and breach of collateral warranty; and contrary to the learned trial judge's finding, there is no res judicata or action estoppel. Kluang Wood was entitled to maintain this action, and the appeal by Kluang Wood be allowed. The order of the learned trial judge dated 18 April 1994 to the extent of dismissing Kluang Wood's claims be set aside. There be an order for damages to be assessed;

as regards Chew, his action stands dismissed for the different reasons given above, and the cross-appeal by Hong Leong (to the extent relating to Kluang Wood) be dismissed.

As to costs, since Kluang Wood abandoned its appeal in respect of the auction sale of the charged land but otherwise succeeds in this appeal while the estate of Chew (deceased) represented by his wife and son fails, and Hong Leong is unsuccessful in its cross-appeal against Kluang Wood, I would exercise the discretion and order that (unless otherwise agreed by parties) the costs of the court below (if not taxed yet) and the costs of this appeal be taxed, that $^1/_2$ of such taxed costs be paid by Hong Leong to Kluang Wood, and $^1/_3$ of such taxed costs be paid by Kluang Wood to Pelita Terang Sdn Bhd; and that the costs of Hong Leong's cross-appeal be also taxed and paid by Hong Leong to Kluang Wood. There be no order as to costs in respect of Chew.

24 October 1998

Mohamed Dzaiddin FCJ: Both the appeal and cross-appeal arose out of the default of the first appellant, the first plaintiff in the court below, to repay the bridging loan of RM3,673,051.50 owed to the first respondent which was secured by the first fixed legal charge over the first appellant's land and the guarantee given by the directors, one of whom was the second appellant. For convenience and brevity, I shall refer the parties herein as the plaintiffs and defendants respectively.

Factual background

The first plaintiff is a licensed housing developer and the registered proprietor of a piece of land held under Johor Grant No 2365, Lot 506, Mukim of Kluang, Daerah Kluang, Johor ('the land'). In early 1983, they negotiated with the first defendant, a public limited company carrying on the business of a licensed finance company under the Finance Companies Act 1969, for banking facilities to enable them to develop the land into a housing estate to be known as Taman Mewah. On 24 August 1983, a formal application ('AB15–16') was made seeking for RM4.5m for bridging loan and RM21m as end-finance. On 26 October 1983, the first defendant approved the application vide a letter of approval, AB17–22 ('the agreement'), which, inter alia, states:

> 26 October 1983
>
> M/s Kluang Wood Products Sdn Bhd
> 4th Floor, SPPL Building
> 315, Alexandra Road,
> Singapore 0315
>
> Dear Sirs
>
> Re: Bridging loan of RM3.5m and end-finance of RM26m
>
> We refer to your loan application and are pleased to confirm that our management committee has approved your bridging loan of RM3.5m and end-finance of RM26m subject to the following terms and conditions:
>
> (1) For bridging loan
>
> Loan amount: RM3.5m
>
> Duration: 24 months from the date of first drawdown.
>
> Security: The bridging loan shall be secured by:
>
> (a) A first fixed charge under the National Land Code on the 32.325 acres of land to be developed and known as Johor Grant No 2365 Lot No 1466, District of Johor Bahru. When individual titles are available, the bridging loan shall be secured by first fixed charge over the 498 titles.
>
> (b) Joint and several guarantee of all the following persons:
>
> (i) Ong Tiong Soon
>
> (ii) Chew Beng Gim
>
> (iii) Leonard Cheng Tye Loke
>
> (iv) Peter Gan Siew Chong

(v) Yap Teck Lock

(vi) Yap Teck Huat

(c) Full and unconditional guarantee of Feng Yuan Holding Pte Ltd.

Interest rate: The prescribed rate of interest payable on this loan shall be 14.5 pa on monthly reducing basis.

Repayment: Payments of monthly interest on the amount drawdown shall begin one month after the loan amount is released in part or in full as to you or on your behalf.
The bridging loan shall be fully repaid by redemption payments at the following rates:

... ...

(2) For end-finance

Manager: Hong Leong Finance Bhd will be the manager for the syndication of end-financing facilities of RM26m to Kluang Wood Products Sdn Bhd to finance the individual purchasers of Taman Putri. In addition, HLFB will also participate in the syndicated loan.

Amount of facility: Total end-financing facilities to be syndicated by HLFB is RM26m. HLFB will provide facilities of up to RM5m.

Purpose of facility: To finance the individual purchasers of the residential and shophouses in Taman Putri.

... ...
... ...

Management fee: 0.5% of total loan amount syndicated (ie 0.5% of RM26m = RM130,000) payable to HFLB upon execution of master agreement.

... ...

... ...

Drawdown: Loan to individual purchaser will be drawdown in proportion to the work-in-progress as certified by the project's architect. Before the drawdown of each loan, the developer has to confirm that the purchaser has paid the difference between the selling price and the loan amount. The final disbursement shall only be made upon issue of the certificate of fitness from the relevant authority.

... ...

Security: (a) Loan agreement between purchaser and end-financier.

A

(b) Assignment of the sale & purchase agreement between purchaser and developer to HFLB.

(c) A first legal charge under the National Land Code over the respective lot upon issue of individual qualified title.

B

Yours faithfully,
For Hong Leong Finance Bhd
Johor Bahru Branch

C

Sgd
Chuang Siow Hwee
Branch Manager

D

I/We confirm acceptance of the above

Sgd
For & on behalf of Kluang Wood Products Sdn Bhd

E On 29 October 1983, the first plaintiff created the first legal charge of the land in favour of the first defendant. Likewise, the second plaintiff together with the other directors of the first plaintiff executed the letter of guarantee, AB23–30. It is to be noted that the charge and guarantee were given as securities for the bridging loan. Upon registration of the charge, the first payment of RM200,000 of the bridging loan was disbursed to the first F plaintiff on 31 October 1983.

Consequently, in January 1984, based on information and particulars supplied by the first plaintiff, the first defendant prepared a placement memorandum for syndication of end-finance of RM26m. The object of this placement memorandum was to enable the first defendant to invite other G interested financial institutions to participate in the syndication of the end-finance. It is of significance to note that under the agreement, the first defendant was mandated to be the lead manager for the syndication and had committed to providing RM5m toward the end-financing. Three financial institutions, namely Public Finance Bhd, Malaysia Credit Finance Bhd and Malayan Banking Bhd responded to the first defendant's invitation to H participate. It seemed that Public Finance Bhd was willing to commit RM3m provided the first defendant surrendered the issue document of title of the lots held by the latter as security, an undertaking that they relinquish all their rights and interests over the said lots in favour of Public Finance Bhd and that these lots be excluded for auction in the event of foreclosure proceedings by the first defendant. However, since the first defendant failed I to give the above undertaking, Public Finance Bhd cancelled their offer to participate in the syndication of the end-finance on 14 March 1986. In the end, there was left only the first defendant's commitment of RM5m, where

security was given in the form of a letter of guarantee dated 16 November 1984, AB216–228, executed by the directors of the first plaintiff, second plaintiff and Feng Yuen Holdings Pte Ltd. A

It is common ground that the first defendant had fully disbursed the bridging loan of RM3.5m to the first plaintiff. By December 1984, the first plaintiff was in dire financial straits because the syndicated end-finance which was part of the agreement was still not available despite the execution of the second guarantee, AB216–228. The first plaintiff also contended that in compliance with the agreement, they had submitted to the first defendant 116 applications for housing loans by their purchasers. B

Finally and most significantly, as at 31 January 1985, the first plaintiff was owing the first defendant RM3,673,051.50 on the bridging loan. Upon failure to repay the aforesaid loan, the first defendant took the following legal action. First, on 8 May 1985, they issued a writ against the guarantors of the first plaintiff (including the second plaintiff) in Johor Bahru High Court CS No 354 of 1985, seeking to enforce the guarantee, AB23–30. On 5 March 1986, a final judgment under O 14 of the Rules of the High Court 1980 ('the RHC') was obtained against the second plaintiff and other guarantors for the aforesaid sum of RM3,673,051.50. C D

Secondly, on 16 May 1985, the first defendant filed an application for order for sale under s 256 of the National Land Code 1965 ('the NLC') against the first plaintiff in Johor Bahru High Court OS No 210/1985. As the first plaintiff did not enter an appearance, on 17 July 1985, the court granted the order for sale of the land. An auction sale was first fixed for 10 November 1985 but this was never proceeded with as the valuation of the land was only completed on 23 December 1985. Three subsequent auctions were carried out without success. Finally, at the fifth auction on 25 January 1987, the land was sold to the first defendant's marketing manager, DW1, who bid on behalf of the second defendant a wholly owned subsidiary of the first defendant for RM3.2m. E F

Thus, it is against the above factual background that the plaintiffs had commenced this action against the first and second defendants in the court below.

G

Pleadings

The plaintiffs' claim against the defendants is for damages for negligent misrepresentation and/or breach of collateral warranty. The re-re-amended statement of claim averred that by the agreement, the first defendant expressly or by necessary implication represented to the first plaintiff that a bridging loan of RM3.5m had been approved and that a syndicated end-financing facility of RM26m to be managed by the first defendant would be made available for the benefit of the purchasers by the first quarter of 1984. The plaintiffs further averred that at the time of making the aforesaid representation, the first defendant intended and very well knew or ought to have known that the first plaintiff would rely on the said representation and H I

A be induced to act upon it, in particular, the first defendant had knowledge or means of knowledge that the housing project on the land could not be completed without the end-finance of RM26m being made available. It was further contended that the first plaintiff, to the knowledge of the first defendant, had a legitimate or reasonable expectation that such end-finance would be made available in order to successfully complete the housing B project. Consequently, the first defendant failed to make available the promised end-finance facility of RM26m, which resulted in their loss.

The plaintiffs contended that the first defendant was under a duty to take reasonable care in the making of the said representation and alleged that the first defendant had made the said representation negligently and C thereby acted in breach of their duty. Paragraph 12 contained particulars of negligence.

On the collateral warranty, the plaintiffs pleaded in para 13 to the effect that the representation thereof constituted a collateral warranty by the first defendant that it would provide the end-finance of RM26m to the first D plaintiff. The first defendant acted in breach of the terms of the said collateral warranty.

The defence

The defendants, in their amended defence, denied the plaintiffs' allegations E that they were guilty of negligent misrepresentation and/or breach of collateral warranty in respect of the end-financing. They averred that they owed no duty of care to the plaintiffs on the alleged representation and further denied that the said representation, if any, was negligently made. By way of further defence, the defendants contended that the plaintiffs were estopped from litigating the principal cause of action in the suit on the F ground of res judicata, which are pleaded in paras 24 to 27 of the amended defence. In essence, the defendants alleged that the issues raised by the plaintiffs in paras 6 to 14 of the re-re-amended statement of claim have already been litigated by the first plaintiff in Johor Bahru High Court Civil Suit No 354 of 1985. The Johor Bahru suit was commenced by the first defendant against, inter alia, the second plaintiff in this suit in respect of a G letter of guarantee dated October 1983 executed by, inter alia, the second plaintiff in this suit to secure the loan of RM3.5m made by the first defendant to the plaintiffs. The High Court at Johor Bahru entered judgment against the defendants on March 1986 after hearing arguments from counsel.

H The second plaintiff had, in the Johor Bahru suit, filed an amended defence and affidavits setting out essentially the same defence as all allegations raised by the plaintiffs in paras 6 to 14 of this suit. These allegations are dealt with by the first defendant in their affidavit-in-reply in the Johor Bahru suit.

I The defendants also averred that the plaintiffs have stated in para 1 of the re-re-amended statement of claim that the second plaintiff was at all

material times a director of the first plaintiff. The first plaintiff was, in the circumstances, well aware of all the facts at material times. A

By reasons thereof, the plaintiffs were estopped from maintaining their claim against the first defendants.

Judgment B

After hearing the evidence and considering the written submissions of counsel, on 18 April 1994, Siti Norma Yaakob J (as she then was) made two basic findings:

(1) that the plaintiffs have succeeded on their principal claim against the first defendant for negligent misrepresentation with respect to the end-finance of RM26m and the representations made on behalf of the first defendant regarding its availability constituted a collateral warranty which had been a breach when no part of the money was made available to the first plaintiff; and C

(2) that the doctrine of res judicata or issue estoppel in the broader sense applies to the proceedings before her. To that end, the plaintiffs' principal claim and the alternative cause of action cannot be re-litigated. D

The appeal E

The appeal is against the finding of the learned trial judge that the plaintiffs' principal cause of action on the tort of negligent misrepresentation and alternatively for breach of collateral warranty could not be litigated again in the proceedings before her on the ground of res judicata or issue estoppel in its broader sense. In her grounds of decision (AR Vol I Bahagian A & B at p 102), her Ladyship gave the following reasons: F

> This plea (of res judicata or issue estoppel in its broader application) stems from separate proceedings commenced by the first defendant against the plaintiffs prior to the filing of this suit. In Johor Bahru Originating Summons No 210/85, the first defendant as chargees of the property commenced foreclosure proceedings against the first plaintiff to recover the outstanding amount due on the bridging loan and on 17 July 1985, obtained an order of court to sell the property by way of public auction. The first plaintiff did not contest the proceedings and neither the second defendant nor the second plaintiff were cited as parties. G
>
> The filing of the foreclosure proceedings was followed, on 8 May 1985, by the first defendant filing Johor Bahru Civil Suit No 354/85, seeking to enforce the guarantee dated 29 October 1983, executed by the second plaintiff and the other directors of the first plaintiff. This guarantee and the charge executed by the first plaintiff were the securities provided by the plaintiffs for the bridging loan. Following a contested O 14 proceedings, the first defendant obtained final judgment against the second plaintiff for the sum of RM3,673,051.50 together with interest and costs on 5 March 1986. Neither the second defendant nor the first plaintiff were parties to this earlier civil suit. H I

A It is the defendants' contention that since all the issues raised in the proceedings before me have been pleaded as defences and argued extensively by the second plaintiff in the O 14 proceedings in the earlier civil suit, firstly before the senior assistant registrar and secondly before the judge in chambers on appeal, and both had found the issues to be unconvincing, there had already been a final decision on those issues for which the plaintiffs are B estopped from raising them again in these proceedings before me. The defendants also rely on the broader application of res judicata that the issues now raised by the plaintiffs to support their causes of action on negligent misrepresentation and breach of a collateral warranty could and should have been raised and litigated upon in the earlier civil suit.

On the same token, the defendants maintain that the same issues could C and should have been raised in the foreclosure proceedings before the Johor Bahru High Court.

Her Ladyship continued (at p 106):

The plea of res judicata is founded on the basis that since a decision has been made in any case or matter, there should be a finality in that decision and the D parties affected by the decision or their privies are estopped from litigating the same cause or matter in subsequent proceedings before the same or another forum.

It is now settled law that for the plea to succeed, the following requirements must be present:

E (1) The same issues must have been decided in both proceedings;

(2) The judicial decision said to create the estoppel was final; and

(3) The parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised.

It is only in respect of requirement (3) that the plaintiffs questioned the F applicability of res judicata on the ground that there is no unity of parties or interest as the first plaintiff were not cited as a party in the earlier civil suit.

That is very true but it must be remembered that as a director of the first plaintiff and the person actually involved in the conduct of the affairs of the first plaintiff, PW1 is an agent of the first plaintiff and as the principal, the first plaintiff must be presumed to be privy to all matters conducted by PW1 on G behalf of the first plaintiff including all matters giving rise to the cause of action in the earlier civil suit. As the second plaintiff was sued as a guarantor in the earlier civil suit in respect of the bridging loan that had been granted by the first defendant to the first plaintiff, there is therefore ample evidence to show that there is a privity of interest between the first plaintiff in these proceedings before me and the second plaintiff in the earlier civil suit and to H that end, res judicata is applicable to put an end to any further proceedings between the same parties based on the same facts which had already been litigated before or could have been raised and litigated in the earlier civil suit. To that end, the plaintiff's principal cause of action on the tort of negligent misrepresentation and the alternative cause of action for breach of a collateral warranty cannot be litigated again in this court and on that finding I dismiss:

I (1) the plaintiffs' principal and alternative claims on the ground of res judicata or issue estoppel in its broader sense; and

(2) the second claim on the ground that it has not been substantiated.

Counsel's submission

Encik Manjit, for the plaintiffs, submitted that the learned trial judge erred in holding that the plaintiffs' action was barred by res judicata or issue estoppel in its broader sense. Counsel submitted that firstly, her Ladyship ought to have recognized that neither the first plaintiff nor the second defendant was a party to the Johor Bahru suit, which was a suit brought by the first defendant against guarantors. Such being the case, the first plaintiff could not possibly have raised the cause of action of negligent misrepresentation and breach of collateral warranty as a defence or counterclaim in the Johor Bahru suit. No doubt, the first plaintiff could have raised these issues in their affidavit to show 'cause to the contrary' against the first defendant's application for order for sale in Johor Bahru OS No 210 of 1985. However, since foreclosure proceedings do not result in a final judgment (*Kandiah Peter v Public Bank Bhd* [1994] 1 MLJ 119), res judicata did not apply to the first plaintiff here. The plaintiffs should not, therefore, be estopped from raising the issues which they could have raised in the foreclosure proceedings in the present action. Further, the Johor Bahru suit was concerned with the recovery of the amount owed under the bridging loan for which the second plaintiff in this suit was one of the guarantors, whereas the present action was a tortious action of negligent misrepresentation made with respect to end-financing. There were thus two distinct actions. Since the first plaintiff could not have raised the present cause of action as a counterclaim in the Johor Bahru suit, they were therefore not precluded from bringing the present claim as a separate action.

Pausing here, lest it be forgotten, the second plaintiff was named as one of the defendants in the Johor Bahru suit.

Secondly, it was submitted that the learned judge was wrong in holding that the first plaintiff was privy to the defendants in the Johor Bahru suit. The learned judge ought to have concluded that there was no common interest between the first plaintiff in the present action and the guarantors, who were the defendants in the Johor Bahru suit.

The law

In this appeal, we are concerned with the doctrine of res judicata which has been extended to what is now described as issue estoppel in its wider sense. In *Carl Zeiss Stiftung v Rayner & Keeler Ltd & Ors (No 2)* [1967] 1 AC 853 at pp 933–934, Lord Guest explained what is issue estoppel:

> As originally categorized, res judicata was known as 'estoppel by record'. But as it is now quite immaterial whether the judicial decision is pronounced by a tribunal which is required to keep a written record of its decision, this nomenclature has disappeared and it may be convenient to describe res judicata in its true and original form as 'cause of action estoppel'. This has long been recognized as operating as a complete bar if the necessary conditions are present. Within recent years the principle has developed so as to extend to what is now described as 'issue estoppel', that is to say, where in a judicial decision between the same parties, some issue which was in

A controversy between the parties and was incidental to the main decision has been decided, then that may create an estoppel per rem judicatam.

In the above case, Lord Guest at p 935 classified three basic requirements of issue estoppel. They are:

B (i) that the same question has been decided;

(ii) that the judicial decision said to create the estoppel was final; and

(iii) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

C The word 'final' in requirement (ii) is understood to mean 'final and conclusive on the merits' of the cause and the decision upon which the issue estoppel arises must itself be final in this sense. 'It puts an end to and absolutely concludes that particular action' (per Lord Herschell in *Nouvion v Freeman* (1889) 15 App Cas 1 at p 9).

D For requirement (iii), the judgment should have been between the same parties or their privies. According to Lord Guest, before a person can be a privy to a party, there must be community or privity of interest between them. His Lordship added that it was essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or its subject matter. *Spencer-Bower and Turner on Res Judicata* (2nd Ed) at E p 209 states that estoppel per rem judicatam operates for, or against, not only the parties, but also those who are privy to them in blood, title, or interest (see also 16 *Halsbury's Laws of England* (4th Ed) at p 874 paras 990–991).

Megarry VC in *Gleeson v J Wippell & Co Ltd* [1977] 3 All ER 54 at F p 515 laid the test for privity of interest in the following words:

> I do not say that one must be the alter ego of the other; but it does seem to me that, having regard to the subject matter of the dispute, there must be a sufficient degree of identification between the two to make it just to hold that the decision to which one was a party, should be binding in proceedings to which the other is a party. It is in that sense that I would regard the phrase G 'privity of interest'.

The above test was applied by the English Court of Appeal in *House of Spring Gardens Ltd v Waite & Ors* [1991] 1 QB 241.

In light of the above pronouncement, has the first plaintiff a privity of interest in the Johor Bahru suit? In my judgment, it certainly has. The first H plaintiff is unquestionably not a party to the Johor Bahru suit, whereas the second plaintiff is a party in both proceedings. The real question is the interest which the first plaintiff has in the subject matter of the Johor Bahru suit. The first plaintiff was the principal debtor under the bridging loan. The second plaintiff was a director of the first plaintiff as well as one of the guarantors of the bridging loan upon which he was sued in the Johor Bahru I High Court. Clearly, the first plaintiff must not only be well aware of the proceedings, but also have special interest in the outcome of the said

proceedings. Hence, there is a privity of interest between the first and second plaintiffs in the Johor Bahru suit. A

Turning to issue estoppel in its wider sense, the locus classicus is *Henderson v Henderson* (1843) 3 Hare 100 at p 115, where Wigram VC states:

> ... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. B C D

The Vice-Chancellor's phrase 'every point which properly belonged to the subject of litigation' was expanded in *Greenhalgh v Mallard* [1947] 2 All ER 255 at p 257 by Somervell LJ:

> ... res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ... it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them. E

Wigram VC's pronouncement has been cited and followed in several subsequent decisions of the highest authority, one of which was the Privy Council decision in *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581, an appeal from the Supreme Court of Hong Kong. Reaffirming the classic statement of Wigram VC in *Henderson v Henderson*, the board reiterated the principle in the following words (at p 590): F

> But there was a wider sense in which the doctrine might be appealed to, so that it became an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. G

In *Brisbane City Council & Myer Shopping Centres Pty Ltd v Attorney-General for Queensland* [1978] 3 WLR 299, the board stressed that the above was the true basis of the doctrine and stressed that it ought only to be applied when the facts are such as to amount to an abuse; otherwise there is a danger of a party being shut out from bringing forward a genuine subject of litigation. H

For Malaysian authorities, see *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 and *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90.

In the present appeal, the question is whether the issues raised in the plaintiffs' statement of claim in the present proceedings are matters which I

could and should have been litigated in the earlier Johor Bahru suit. Let us now examine the pleadings.

Clearly, paras 6 to 14 of the plaintiffs' re-re-amended statement of claim contain allegations of fact to support a tortious action of negligent misrepresentation and/or breach of collateral warranty on the part of the first defendant. Except for the elaborateness of the pleadings, which contain particulars of alleged negligence, in my view, the issues pleaded in these paragraphs are, in substance, the same as the matters raised by the second plaintiff and his co-defendants in their affidavits in the Johor Bahru suit. In their affidavits-in-reply against the first defendant's application for summary judgment under O 14 of the RHC, both the first and fifth defendants affirmed similar affidavits on behalf of themselves and the co-defendants who included the second plaintiff here, deposing as follows:

(1) that sometime in September 1983, the first plaintiff as developers applied to the first defendant for bridging finance and end-financing for housing development;

(2) that the said bridging loan of RM3.5m was to be paid out from the end-financing of RM26m;

(3) that the first plaintiff have sold some houses to the purchasers who had applied for housing loan;

(4) that if the end-financing was released that would be sufficient to pay the amount due and owing by them to the first defendant. In the circumstances, the first defendant should be estopped from claiming the sum owed by the first plaintiff from them as guarantors; and

(5) lastly, that the first defendant and/or their servants or agents had misrepresented to them about the end-financing which the first defendant had agreed to release the loan granted to the purchasers to the first plaintiff and which would be utilized to repay the bridging loan owed by the first plaintiff to the first defendant. Hence, upon this representation, it was contended that the defendants in the Johor Bahru suit executed the second letter of guarantee, AB216–228. The Johor Bahru High Court however found no triable defence had been raised and granted summary judgment against the defendants, for which no appeal had been filed against the said judgment.

In light of what I have stated above, I find that the issues in the present proceedings had actually been raised, though in an oblique way, by the second plaintiff and his co-defendants in their affidavits-in-reply to the first defendant's O 14 application in the Johor Bahru suit. With the benefit of hindsight, I see no difficulty for the defendants, especially the second plaintiff, to instruct their solicitors to raise the issue of negligent misrepresentation in the defence or plead as a counterclaim in the Johor Bahru suit. The second plaintiff, as a director of the first plaintiff and one of the defendants in the Johor Bahru suit, was personally involved in the negotiations for the banking facilities on behalf of the first plaintiff. Hence,

there was no excuse for him not to give proper and adequate instructions to the solicitors regarding the alleged representations made by Mr Pang Wee Pat about the end-financing. After all, these facts were available at the time of the Johor Bahru suit. No compelling reason has been advanced to show that the issue could not have been pleaded in the Johor Bahru suit except to contend that since the first plaintiff was not a party to the Johor Bahru suit, they were not estopped from bringing a separate action against the defendants for negligent misrepresentation etc.

Based on the authorities I have referred to above in my judgment, this is a clear case where the subject matter of the plaintiffs' claim in the present proceedings could and should have been pleaded in the defence in the Johor Bahru suit or raised as a triable issue under O 14 application to the Johor Bahru suit. In the circumstances, it would be an abuse of the process of the court to allow the first plaintiff to bring a new proceeding in respect of the same issue which should have been litigated in the earlier Johor Bahru proceedings (*Yat Tung Investment Co Ltd v Dao Heng Bank Ltd & Anor* [1975] AC 581 at p 590).

For the above reasons, I agree with the conclusion of the learned judge and the appeal should be dismissed.

Cross-appeal

The cross-appeal by the first defendant is against the finding of the learned judge that the plaintiffs have succeeded on their principal claim for negligent misrepresentation and the alternative claim for breach of collateral warranty in respect of the end-finance of RM26m.

Negligent misrepresentation

It will be noted that the plaintiffs' claim of negligent misrepresentation was premised on an alleged oral promise of the first defendant's servant or agent to procure the syndication of RM26m as end-finance with the first drawdown to be made in the first quarter of 1984. In this regard, her Ladyship seemed to have relied on the oral testimony of the second plaintiff, PW1 (now deceased), in the court below. PW1 stated that he had several negotiations with one Mr Pang Wee Pat, the first defendant's southern regional manager, regarding the banking facilities to finance the first plaintiff's housing project prior to the acceptance of the facilities under the agreement. In the course of their negotiations, it seemed Pang made certain statements which led PW1 to believe that the syndication of the end-finance would pose no problem and that the first defendant could secure it for the first plaintiff.

Based on PW1's evidence, the learned judge found as follows (pp 77–78):

> PW1's oral testimony is that during the negotiations, Pang made two specific representations:

A (1) that the first defendant would have no difficulty in procuring the syndicated end-finance and that its availability was a certainty; and

(2) that the first drawdown of the end-finance would come during the first quarter of 1984,

and these representations assured and convinced PW1 that the project would be successfully completed with such end-finance. It was following these B negotiations that AB15 was tendered and approved by the first defendant with the granting of a bridging loan of RM3.5m and a syndicated loan of RM26m through their letter AB17–22. It is this letter which the plaintiffs rely to support their contention that the first defendant had expressly or by necessary implication represented to the first plaintiff that a syndicated end-finance of RM26m would be made available to the purchasers of Taman Mewah.

C She then concluded (at p 82):

It was these assurances that led PW1 to believe that the end-finance was a certainty as the first defendant would not encounter any difficulty in getting the necessary participation from interested financial institutions and assured of the fact that end-finance was in place, the first plaintiff started constructing D the 325 units of phase 1 in January 1984 expecting them to be completed by the end of 1985.

Having found that Pang had given the assurance regarding the certainty of securing the end-finance, her Ladyship next posed this question:

E Was Pang negligent in making the representations as the essence of the tort of misrepresentation is the negligent manner in which the statements were made (at p 91)?

Citing a passage from *Charlesworth & Percy on Negligence* (8th Ed) at p 83, she concluded that in the circumstances of the case, she had no reason to doubt Pang's statement and held the first defendant liable.

F The finding of the learned judge on negligent misrepresentation stemmed from the failure of the first defendant to secure for the first plaintiff the syndication of the end-finance of RM26m. Based on PW1's evidence and the agreement containing terms for the end-finance, her Ladyship concluded that the first defendant did expressly or by necessary G implication represent to the first plaintiff that a syndicated end-finance of RM26m would be made available to the first plaintiff' purchasers.

Before this court, En Cecil Abraham submitted that the learned judge erred in law when interpreting the agreement by placing the first defendant under an obligation to secure the syndication of the end-finance. The question of end-finance should be considered purely on contractual H standpoint. Counsel argued that under the terms of the agreement, the first defendant as lead manager was only obliged to try and secure the end-finance facility by getting other financial institutions to participate in the syndication. The first defendant was not contractually obliged to procure the end-financing except their commitment to provide RM5m toward the I said loan. Moreover, the syndication of the loan was conditional upon the first plaintiff's compliance with the terms and conditions of the agreement

which the first plaintiff had failed to comply with. Counsel submitted except for the first defendant's obligation to provide RM5m which was readily available where a guarantee agreement dated 16 November 1984 was executed by the first plaintiff's directors, the syndication exercise did not materialize because the first plaintiff could not fulfil some of the conditions of the agreement. This was compounded when the said housing project came to a halt in January 1985 due to the buyers losing interest in purchasing the houses. For the above reasons, counsel submitted that the first defendant was not to blame for not securing the end-finance of RM26m for the first plaintiff.

The critical question here is whether the first defendant is legally obliged to secure the syndication of the end-finance facility of RM26m. It is of importance to note that the agreement, AB17–22, stated that the management committee of the first defendant had approved the bridging loan of RM3.5m and end-finance of RM26m subject to the terms and conditions provided therein. Thus, the opening paragraph states:

> We refer to your loan application and are pleased to confirm that our management committee has approved your bridging loan of RM3.5m and end-finance of RM26m subject to the following terms and conditions: ... .

Therefore, since the granting of both loan facilities is subject to compliance of the terms and conditions stipulated therein, it is trite that one has to look at Pt II of the agreement to see what are the terms for the granting and releasing of the end-finance of RM26m. Clearly under 'For end-finance', it is stipulated that the first defendant will be the manager for the syndication of end-financing facility of RM26m to the first plaintiff and the first defendant will also participate in the syndicated loan. This means the end-finance facility will be syndicated and the first defendant will act as the manager. It is also a term of the agreement that the first defendant would be paid a management fee of 0.5% of total loan amount syndicated. In my opinion, as the end-financing loan involves syndication, the approval of the said facility must be subject to the compliance of such terms as getting the participation of the financial institutions and the execution of a participation agreement between the lead bank ie the manager for the syndication and each participating financial institution.

It must be appreciated that syndication of loan has been a feature of domestic financing in Malaysia for some time. Syndication is a term used to refer to a loan whereby several lenders ie banks and financial institutions combine in their efforts to extend a loan to a borrower. Usually, the sums involved are too large a sum for a single bank to grant the loan. So, the lead bank makes the necessary approaches to other banks for participation in the syndication.

Gabriel's Legal Aspect of Syndicated Loan (1986, Butterworths) at p 115 explains in simple language what is syndication:

> By syndication is meant two basic activities; one where there is a group of banks lending directly to the borrower, and the other where one bank lends directly or agrees to lend to the borrower and then subsequently sells all or

A part of its interest in the loan to other lenders. In both situations, there is typically one main bank, referred to as the lead bank or lead manager, or simply as the lead, which enters into initial discussions with the borrower. Typically, upon successful discussions, the borrower would grant the lead bank the 'mandate' or authority to syndicate the credit. The lead in turn commits to the borrower to syndicate the credit. Such commitment is usually B made on a 'best effort' or 'in principle' or 'fully underwritten' basis. The offer to the borrower may further be made 'subject to acceptable documentation'.

Armed with this mandate, the lead bank then makes the necessary approaches to various banks to include them as principals to the envisaged loan agreement or as indirect participants depending on the kind of syndication contemplated by the borrower and the lead bank.

C Taking cognizance of the above principle of loan syndication and on the true construction of Pt II, 'For end-finance' in the agreement, in my opinion in the circumstances of this case, the approval of end-finance of RM26m to the first plaintiff must be subject to, principally, the participation of the other financial institutions in the syndication of the said end-finance. Since, D as will be shown shortly, the said syndication did not materialize and no participation agreement was executed between the first defendant as syndicate leader and the other lenders, it is wrong for the court to hold the first defendant liable to the first plaintiff under the agreement.

I am also of the view that the finding of the learned judge at p 79 that the conduct of the first defendant in preparing the placement memorandum E and using it to invite potential financial institutions to participate in the syndication of the end-finance facility amounted to giving an unqualified commitment to the first plaintiff to make available the end-finance loan subject to the terms and conditions of the agreement is misconceived. Clearly, the learned judge failed to appreciate the legal concept of loan syndication, especially the purpose of a placement memorandum. It is trite F that in loan syndication, the preparation of a placement memorandum is a condition precedent to a commitment to lend by the participating financial institutions. A passage from an article 'Loan Syndication: The Placing Memorandum and its Implications for the Managing or Lead Bank' by Mr Anthony Lim Wee Teck in [1982] 2 MLJ lix is instructive. The learned G writer stated (at p lix):

> In structuring and selling the loan, the lead bank with the assistance of the borrower often prepares a placing or information memorandum summarizing the financial condition of the borrower, the soundness of the collateral offered and the structure, terms and conditions of the proposed loan, so that the prospective participants to whom it is distributed can evaluate and form a H decision as to the proposal. This memorandum frequently contains claims and projections that are wholly unsubstantiated. The lead bank, in an effort to limit its liability for these representations, typically includes a disclaimer limiting its responsibility for verifying that all facts presented are true and that all material facts have been disclosed. The lead bank also encourages each participant to conduct an independent credit analysis of the borrower.

I In the present case, DW1 testified that the first defendant prepared the placement memorandum after consulting the first plaintiff, who earlier

agreed that the first defendant would act as manager in the syndication of the end-finance of RM26m. They then sent out the placement memorandum to eight financial institutions operating in Kluang. Apparently, the first defendant, Public Finance Bhd and Malaysia Credit Finance Bhd were interested to participate in the syndication. Both the first defendant and Public Finance Bhd had initially offered to provide RM5m and RM3m respectively toward the syndication. However, due to some disagreement regarding the security for the loan, Public Finance Bhd withdrew its offer. Hence, the entire syndication for the end-finance of RM26m never materialized.

It is not disputed that under the agreement, the first defendant would provide RM5m toward the end-finance facility. It seemed that the said facility was readily available and the first plaintiff's directors executed a guarantee agreement on 16 November 1984. However, the release of the aforesaid amount would be subject to the conditions provided for under the said agreement. Firstly, the payment of a management fee of 0.5% to the first defendant upon the execution of the master agreement. Secondly, money payable as end-financing money would only be drawndown in proportion to work in progress to be certified by the project's architect. In short, the project architect's certificates are a pre-requisite for the release of the end-finance. From the evidence of PW1 and DW1, I am satisfied the management fee of 0.5% of the amount syndicated was never paid by the first plaintiff. Nor was the master agreement signed. PW1 also testified that there was no project architect's certificates available. In the result, no housing loan was given out to the first plaintiff's purchasers because the syndication of the sum of RM26m for end-financing did not go through, not only because of lack of participation by financial institutions, but also non-fulfilment of the conditions under the agreement by the first plaintiff. In the circumstances, no liability could be attributed to the first defendant or their servant or agent in failing to secure the end-finance facility of RM26m.

For the above reasons, I am of opinion and respectfully hold that the learned judge was wrong in her conclusion that the plaintiffs have proved their claim of negligent misrepresentation against the first defendant because Pang had represented to the first plaintiff the availability of end-finance was a certainty and the first drawdown would be made in the first quarter of 1984.

Collateral warranty

With respect to the alternative cause of action for a breach of collateral warranty, the trial judge held that Pang's oral representation constituted a collateral warranty and therefore, the plaintiffs had successfully made out their case against the first defendant for a breach of the warranty.

Counsel submitted that the learned judge was wrong in fact and law to rely on PW1's evidence regarding Pang's assurance as constituting a representation. According to counsel, PW1 merely formed an impression after hearing what Pang allegedly told him about the availability of the end-

finance. The learned judge had 'elevated' the word 'impression' to a 'representation'.

This is how the learned judge approached the issue (at pp 93–95):

> To establish the presence of a collateral contract, the plaintiffs must show:
>
> (1) that there must be a representation which was intended by the defendants to be relied upon;
>
> (2) the representation induced the signing of the contract; and
>
> (3) the representation itself must amount to a warranty, collateral to the main contract and existing side by side with it.
>
> I have already made a finding that Pang did utter the statements which resulted in AB17–22 being issued and accepted, the charge, AB31–47, executed in favour of the first defendant and the guarantee, AB23–30, executed by the second plaintiff being the other security given for the bridging loan ... .
>
> As I have indicated above, Pang was the first defendant's chief manager, southern region, and in that capacity had the authority to approve loan facilities on behalf of the first defendant. There is also the evidence of DW1, DW2 and DW4 that where a developer buys land for the purpose of developing it, the availability of end-finance is an important consideration for him and usually the developer takes the end-finance to repay the bridging loan. This aptly describes the situation the first plaintiff found themselves when PW1 approached Pang for a bridging loan and end-finance and on being made aware of the first plaintiff's purpose and intentions, Pang must be presumed to have intended that whatever representations he made on the availability of end-finance would be relied upon by the first plaintiff.

At p 98, she concluded:

> For the reasons that I have given, the plaintiffs have also successfully made out a case on the alternative plea that the defendants' oral representations constituted a collateral warranty and that there had been a breach of it when no part of the end-finance came from the first defendant.

Clearly, from the above grounds of decision, the finding of the learned judge was based on the representation allegedly made by Pang to PW1. In this regard, her Ladyship relied entirely on PW1's testimony. For the purpose of determining whether Pang's alleged statements amount to a warranty enforceable at the suit of the plaintiffs, I am guided by the test laid down by Lord Denning MR in *Dick Bentley Productions Ltd & Anor v Harold Smith (Motors) Ltd* [1965] 2 All ER 65 at p 67, a test which had been followed and applied in subsequent cases (see *Tan Chong & Sons Motors Co (Sdn) Bhd v Alan McKnight* [1983] 1 MLJ 220 at p 227). The test is:

> Looking at the cases once more, as we have done so often, it seems to me that if a representation is made in the course of dealings for a contract for the very purpose of inducing the other party to act on it, and it actually induces him to act on it by entering into the contract, that is prima facie ground for inferring that the representation was intended as a warranty. It is not necessary to speak of it as being collateral. Suffice is that the representation was intended to be acted on and was in fact acted on.

Applying the above test, the key issue here is whether PW1's evidence regarding what he gathered from Pang's alleged statement during the negotiations for bank loans to the first plaintiff amounts to representation. The critical passage of PW1's evidence is found at pp 125–126:

> We discussed in details the financial package that the first plaintiff requested for the development of Taman Mewah. The first plaintiff required the bridging loan and an end-financing for the interested house buyers. The managers of Hong Leong Finance required information of the first plaintiff and this information includes the paid-up capital of the company and all relevant information about the company.
>
> In the course of the discussions, Hong Leong was furnished with cash flow projections and drawdown through my secretary on or about 15 August 1983.
>
> The bridging loan was to be done by the Hong Leong alone and Mr Pang proposed to syndicate the end-financing. By syndication, several banks would get together and provide the money and Hong Leong Finance would take the lead of this syndication. The amount of the bridging loan was discussed for RM4$^1/_2$m and RM21m for the end-financing for the house buyers.
>
> *In the course of the discussions in 1983, my impression was that Hong Leong was a big financial institution and they gave me the impression that their financing would pose no problem.* There was no indication that they would fail. Mr Pang told me that the total amount including bridging loan and end-financing was peanuts as far as Hong Leong was concerned. I accepted this as Hong Leong is a big company both in Singapore and Malaysia. It is a multilateral and multinational company.
>
> *This assurance* as to the availability as to syndication was not qualified in any way. (Emphasis added.)

PW1 continued (at p 129):

> The drawdown is of utmost importance to the first plaintiff. Neither Mr Pang nor Mr Chuang gave me any indication that there would be a problem to the first drawdown on the first quarter of 1984. The first defendant did not give me the impression that they would not be in a position to give the end-financing. They were very serious.

In addition to the above passages, I have examined the rest of PW1's evidence closely with particular regard to the surrounding circumstances upon which Pang was alleged to have made the statements concerning the end-finance which led the learned judge to make the following finding (at p 81):

> This is clear from the evidence of PW1 when he testified that he was assured by Pang that an entity of the first defendant's financial standing would have no difficulty in procuring the syndication of the end-finance and that the sum of RM21m, the amount that was then under consideration as the end-finance, was 'peanuts' as far as the first defendant were concerned and that the first drawdown of the end-finance was available during the first quarter of 1984.

In my view, the learned judge misdirected herself in the appreciation of PW1's evidence. Nowhere in the evidence was it said that Pang had

represented to him about the first defendant securing the end-finance for the first plaintiff and the first drawdown would be on the first quarter of 1984. What PW1 said was to the effect that in the course of his discussions with Pang in 1983 regarding banking facility for the first plaintiff's project, he formed an impression that the first defendant would not have any problem in securing the end-finance. It would appear that this impression is based on the following factors. First, he knew that the first defendant was a big financial institution and as such their financing would pose no problem. Secondly, he said Pang told him that the amount of the entire loan was peanuts as far as the first defendant were concerned. He believed what Pang told him because he knew that the first defendant was a big multilateral and multinational company operating both in Malaysia and Singapore. On the drawdown of the loan, he said Pang did not give any indication that there would be a problem for its first drawdown to be made on the first quarter of 1984. Hence, he concluded:

> The first defendant did not give me the impression that they would not be in a position to give the end-financing. They were very serious.

Based on the above evidence, I am in no doubt at all that Pang never represented to PW1 about the certainty of the first defendant securing the end-finance for the first plaintiff. In my view, the impression formed by PW1 does not amount to a representation, nor can it be implied that a warranty had been given by Pang on behalf of the first defendant.

In the circumstances, I hold that Pang never made any oral representation to PW1.

In law, in order to establish a collateral warranty, the plaintiff has to establish, inter alia, that the relevant statement is promissory and not merely representational. This test was enunciated by the highest court of Australia, ie the High Court in *JJ Savage & Sons Pty Ltd v Blakney* (1970) 119 CLR 435 at p 442 and later followed by the same court in *Ross v Allis-Chalmers Australia Pty Ltd* (1980) 55 ALJR 8. The brief facts of the case were these. The plaintiff claimed that he purchased a harvester on the face of the promise made to him concerning its performance by Mr Preston, a servant of the defendant. He claimed further that the promise or warranty was not fulfilled and that as a result, he suffered loss for which he sought damages. The context in which the actual statement was made was that the plaintiff said that Preston (the area manager) had said to him that 'as a contractor, he was able to get with his machine ('the C2') in the vicinity of 100 acres a day in very good going, and that (the plaintiff) could expect to be able to operate these gleaners in top gear in very good going'. The plaintiff had then made certain calculations and he had put to Preston the assumption that he would get 120 to 130 acres a day and that Preston had then said that he (the plaintiff) '... may have been a little bit optimistic on my (the plaintiff's) 110 to 120 acres'. The plaintiff then said to Preston 'Well bring it back for budgeting purposes to 100. Is that feasible?' and that Preston had then said 'my own experience with our machine is you should budget on 90 acres per day'. It is this last statement which is claimed to be

a collateral warranty. In his action in the Supreme Court of NSW, the plaintiff failed to persuade the trial judge that the above statement amounted to a warranty. He appealed to the Court of Appeal where he also failed. On further appeal to the High Court of Australia, in dismissing the appeal, it held that in the context in which the statement was made, the words used by Preston did not constitute a warranty and amounted to no more than a statement of Preston's opinion, based on his own experience with his own machine. By reason of its character, it contained no promissory element.

In his judgment, Aickin J stated (at p 12):

> It seems to me that the critical conversation as deposed to stopped short at the point of representation and contained no promissory element. For that representation to be converted into a promise there would have been required at least some further question such as 'Can you promise that?', and an affirmative answer.
>
> The distinction between a representation and a promise is clear enough in law but it is one which laymen would probably find hard to understand, since it depends in many cases on niceties of language in conversations recounted, often years afterwards, by persons who would not have been conscious of the significance of the particular words used at the time. In these circumstances, the search for 'promissory language' becomes a somewhat unreal one and the distinction between an inducement and a promise a very fine one. However these are the criteria upon which this particular point depends and they propound a test ...

Assuming for the moment that this court accepts PW1's evidence on Pang's statement regarding the availability of the end-finance, in my view, such statement or representation cannot be promissory in nature. For the representation to be converted into a promise, there ought to be clearer evidence from PW1 what Pang actually said during the course of their discussion. What is in evidence is only PW1's impression. Further, in the course of their discussions regarding the entire bank loan, PW1 must have known or presumed to know that in banking practice, end-finance facility requires the approval of all participating financial institutions. At that point of time, it was inconceivable for PW1 or Pang to know which banks or financial institutions would participate in the syndication. Moreover, PW1 must know that syndication depended upon compliance with the conditions in Pt II of the agreement. In my view, in such circumstances, it is unlikely for Pang, being an experienced banker to give an assurance or promise that the first defendant would secure the end-financing facility at whatever cost. After analysing PW1's evidence on the issue, I am satisfied that his evidence regarding Pang's alleged representation contains no promissory element and therefore, does not amount to a warranty.

Another legal point raised by En Abraham concerned the admissibility of Pang's oral representation under proviso (b) of s 92 of the Evidence Act 1950 ('the Act'). I note from the appeal record that this point was never fully canvassed before the trial judge, although the Federal Court judgment in *Tan Swee Hoe Co Ltd v Ali Hussain Bros* [1980] 2 MLJ 16 was cited and

briefly discussed in the written submission. In view of my conclusion that Pang's statement does not constitute a warranty, I think it unnecessary to deliberate and express an opinion without the benefit of hearing counsel on this important point of law. Perhaps, there may be an occasion in the near future for this point to be raised again and fully argued. Nonetheless, it is still an important point of law because of a conflict of judicial opinion regarding s 92 of the Act and its exceptions. In *Tan Swee Hoe*, Raja Azlan Shah CJ (Malaya) (as his Majesty then was) seemed to rely on English precedents on parol evidence to support the proposition that an oral promise given at the time of contracting which induces a party to enter into the contract, overrides the main written agreement. His Majesty continued (at p 18):

> This device of collateral contract does not offend the extrinsic evidence rule because the oral promise is not imported into the main agreement. Instead it constitutes a separate contract which exists side by side with the main agreement.

In *Tan Chong & Sons Motor Co v Alan McKnight*, the Federal Court had also to consider the admissibility of pre-contract statements under s 92 of the Act. Unfortunately, Tan Swee Hoe was never referred to the court. But Salleh Abas FJ (as he then was) in dealing with the issue, observed (at p 229):

> The primary purpose of proving the pre-contractual statements ... was not to contradict, vary, add or subtract the terms of the order, but to prove the existence of a warranty, a separate contractual promise, although such proof resulted in a conflict between the warranty and the terms of the contract ... . Such proof is obviously allowed by the provisos (b) and (c) and illustrations (d), (g) and (b) of s 92.

However, in *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229, the Federal Court took a different approach by applying the strict language of the section. At p 233, Chang Min Tat FJ observed:

> I think and I say so with respect, the fundamental mistake made by the learned judge is to conclude simply and without qualification that s 92 applies only to a case where all the terms of the agreement have been reduced to writing. But that is not what s 92 says. It merely says 'where the terms ...' and by referring back to s 91, it means where the terms of a contract have been reduced to writing, as in this particular agreement they had been, the contract could only be proved by the document itself, and it is not open to the respondent to seek to introduce and the judge to admit evidence that would, inter alia, add new terms to it.
>
> However s 92 allows, so far as it concerns this particular case, evidence in proviso (b) of 'any separate oral agreement, as to any matter on which a document is silent and which is not inconsistent with its terms' and in proviso (c) of 'any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract... .' The provisos qualify but do not eliminate the main provisions of the section, so that unless the additional evidence sought to be adduced falls within the scope of any of the provisos, it should not be allowed to be introduced as it would be to contradict, vary, add to or subtract from the terms of the agreement.

Having stated the above, it is my conclusion that her Ladyship had committed an error of law in her finding that Pang's statement amounted to a warranty and the evidence established a breach of it.

Conclusion

For the above reasons, the plaintiffs' appeal should be dismissed and the defendants' cross-appeal be allowed with costs. Deposit for the appeal be paid to the defendants to account for taxed costs.

First appellant's appeal allowed and first respondent's cross-appeal dismissed.

Reported by David Lai